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WHITE & TUDOR'S
LEADING CASES IN EQUITY.

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WHITE & TUDOR'S
LEADING CASES IN EQUITY

With Notes.

NINTH EDITION.

BY

E. P. HEWITT, LL.D.,
One of His Majesty's Counsel, and a Bencher of Lincoln's Inn,

AND

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of the Middle Temple, Barrister-at-Law.

"Pray let us so resolve cases here that they may stand with the reason of mankind when they are debated abroad."—*Per* Lord NOTTINGHAM in *Duke of Norfolk's Case*, 3 Ch. Cases, 33.

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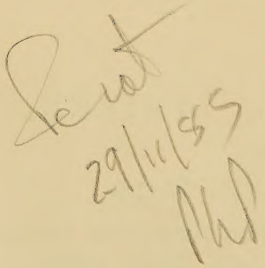

PREFACE.

New legislation, and the length of time (eighteen years) since the last production of this work, have required very considerable alterations to be made in the present edition. With the exception of *Agar* v. *Fairfax* (relating to *partition*), the cases which appeared in the previous edition have been allowed to stand; but some of these cases, *e.g.*, *Strathmore* v. *Bowes* (fraud on marital rights) and *Elibank* v. *Montolieu* (a wife's equity to a settlement) have been dealt with very briefly, on account of their greatly reduced importance.

Certain repetitions which appeared in previous editions have been struck out and many of the passages have been re-written. The work as a whole has been materially shortened; and it is hoped that this fact will increase its utility to the profession.

It should be mentioned that extremely useful work was done in connection with the first volume and also the first part of the second volume by Mr. H. V. Batchelor, who, however, is now joining the other branch of the legal profession. The laborious but important work of indexing has been carried out by Mr. Dougal Meston, a member of Lincoln's Inn.

June, 1928.

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ADMINISTRATION.

DUKE OF ANCASTER *v.* MAYER.

1783, 1784, 1785. 1 Bro. Ch. 453.

Primary Liability of Personal Estate to the Payment of Debts (*a*).—**Exoneration.**

Personal estate, not specifically bequeathed, is primarily liable to the payment of the debts of a testator, unless it be exempted by express words or necessary implication.

Notwithstanding a charge upon a term for payment of debts, a leasehold estate purchased by the testator subject to a mortgage shall bear the burden of that mortgage, it not being properly the debt of the testator.

Charles Bertie made his will, dated November 9, 1759, and thereby devised as follows: "I give and devise to Thomas Noel and John Mayer, their executors, administrators, and assigns, all those my manors, lands, etc., in Lincolnshire, to have and to hold to them, from the time of my decease, *for the term of ninety-nine years,* upon the trusts hereinafter mentioned." He then gave the real estate, subject to the term, and in default of issue of his own body, to Montague Bertie, for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, with remainders over, and afterwards declared as follows: "I do hereby declare, that the *term and estate so as aforesaid limited to them the said Thomas Noel and John Mayer their executors, administrators, and assigns, for ninety-nine years,* is upon the special trust and confidence, and to the intents and purposes following; that is to say, Upon trust and confidence that they the said Thomas Noel and John

(*a*) This case must be read subject to the alterations made by the Administration of Estates Act, 1925; see *infra*, pp. 22, 23, 26—28.

Mayer, their executors, etc., shall *out of the rents and profits*, or *by mortgage, assignment, or demise* of all or any part of my before-mentioned manors, etc., or any of them, for all or any part of the said term of ninety-nine years, or otherwise as to their discretion shall seem meet, levy and raise so much lawful money of Great Britain as will be sufficient to *pay and satisfy all the debts I shall owe at the time of my decease*, my funeral charges, and all the legacies and sums of money given by me in and by this my will, and pay and apply the same accordingly. And my will and mind is, that after so much money shall be raised as shall answer the purposes aforesaid, together with all costs and charges in or about levying or raising thereof, the said term shall cease and determine." He then devised as follows: "*I give and devise* to my brother, Montague Bertie, his executors and administrators, all that the *manor of* East and West Deeping, *holden by lease from the Crown, subject* to the yearly rent and covenants reserved in the said lease, and also *subject to the mortgage thereon to Mrs. Millicent Neate, of London, for* £6,500; but in case my said brother shall not be living at the time of my decease, then I give the said estate and premises, with the appurtenances (subject as aforesaid), to such person as shall be entitled to the freehold of my real estate at the time of my decease, by virtue of the aforesaid limitations in this my will." And towards the end of his will he devised as follows: "Item, I also give all my household goods, and all other my goods, chattels, effects, and personal estate whatsoever and wheresoever, unto my said brother, Montague Bertie, if he shall be living at the time of my death; but in case he shall be then dead, I give and devise the same to such person as shall be entitled to the freehold of my real estate, under and by virtue of the limitations in this my will: Provided always, and I do hereby declare my mind and will to be, that in case I shall, at the time of my death, leave issue of my own body, that then, and in such case as well all and every the before mentioned uses, devises, and limitations to my said brother, Montague Bertie, the Duke of Ancaster, and their respective heirs, and also the devise of the residue of my personal estate, shall be utterly void; and in such case I do hereby will,

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and my mind is, that all my real estate, subject to the said term of ninety-nine years, shall descend according to the rules of law, and that the residue of my personal estate shall go and be distributed in such manner, and to and among such persons, as if I had died intestate. And I do hereby nominate and appoint the said Thomas Noel and John Mayer executors of this my last will; and I do hereby will, order, direct, and appoint, that my said executors and the survivor of them shall and do pay, satisfy, and discharge my funeral charges, *and all my debts and legacies*, as soon as they shall become due and payable, by such methods, ways, and means, and in such manner as he or they, or their counsel learned in the law, shall in that behalf advise and think meet; and it shall and may be lawful to my said executors, or either of them, to deduct and satisfy to him or themselves, out of my personal estate, or out of the monies to be raised out of the said term of ninety-nine years before to them devised, all such disbursements, expenses, and charges which they or either of them shall be put to in proving this my will, or by any other ways or means whatsoever in or about the execution of this my will."

Montague Bertie died in the lifetime of the testator, and the plaintiff became entitled, under the limitations in the will, to the real estate.

The *leasehold estate had been, several years before, mortgaged by the testator's father for* £6,500 to Mrs. Neate, and in 1765 the mortgage was assigned, by the desire of the testator, to Sir Thomas Palmer, who advanced the testator a further sum of £100 on it, and the testator conveyed other estates as an additional security for the £6,600.

This cause was first heard before the late Lords Commissioners.

Mr. Mansfield, Mr. Madocks, and Mr. Kenyon, for the plaintiffs.—There are three questions in this case: first, whether the personal estate is exonerated of the debts (*b*); secondly,

(*b*) *Wainwright* v. *Bendelowes*, 2 Vern. 718; *Anderton* v. *Cooke*, 1 Bro. Ch. 456; *Stapleton* v. *Colville*, Cas. t. Talbot, 202; *Kynaston* v. *K.*, 1 Bro. Ch. 457; *Holiday* v. *Bowman*, 1 Bro. Ch. 145; *Bampfield* v. *Wyndham*, Pr. Ch. 101; as to which three last cases see *infra*, p. 17, n. (*t*).

whether the mortgaged estate is liable to the mortgage (*c*); thirdly, what interest the duke takes in the personal estate.

Mr. Selwyn, Mr. Arden, and Mr. Ainge, for the defendants.—As to the last question, we contend the duke can take a limited interest for life only, there being no addition of executors or administrators in the will. Secondly, with respect to the second, that the mortgaged premises must bear their own burthen.

As to the first point, which is the principal question, it depends on the several clauses in the will (*d*).

Lords Commissioners Ashurst and Hotham held: (1) that the plaintiff was entitled to the personal estate exempt from payment of debts; (2) that the mortgage must be paid out of the devised estate; (3) that the plaintiff took an absolute interest in the personalty.

A petition was presented for a rehearing, which came on before Lord Thurlow, June 16, 1784. The arguments used, and the cases cited, were a recapitulation of those before the Lords Commissioners.

Lord Chancellor Thurlow.—It would be highly advantageous to property if there were a settled rule where the personalty shall be applied to the payment of debts, and where it shall be exempted from them. One step has been taken toward such a rule, by its being laid down, that charging the estate in any way is not of itself an exemption of the personal estate; that the personal estate being the fund first liable, where it is to be aided by either a legal or an equitable fund, it must be itself in the first place applied.

The question that next arises is, whether, a real estate being charged, and the personal given away, a presumption arises that this shall be exempted from the debts. I never heard, till the arguments in this case, that such a rule had been extracted from the authorities on the subject; on the contrary, I have

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(*c*) *Serle* v. *St. Eloy*, 2 P. W. 386; *Galton* v. *Hancock*, 2 Atk. 437.

(*d*) *Bromhall* v. *Wilbraham* (at the Rolls, November, 1734); *Inchiquin* v. *French*, 1 Cox, 1; *Fereges* v. *Robinson*, Bunb. 301; *Stephenson* v. *Heathcote*, 1 Eden, 38.

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always understood that, in order to exempt the personal estate, the testator must express an intention so to do, although no particular form of words was necessary for the purpose. *I therefore take the rule* in primis *to be, that neither the charge of the debts upon the real estate, or the gift of the personal is sufficient of itself to exempt it.* But it is indubitably true, that express words are not necessary to exempt the personal estate: the question therefore is, whether a presumption can be drawn of the testator's intention to exonerate the personal estate. It is impossible to express in definition what circumstances shall be sufficient to raise this presumption. It must arise from the context of the will; but, with great deference to the opinion which has been given, I think there is not sufficient in this will.

After devising his real estate, the testator takes up the term; he places it before any of his other estates, and before his issue, so that he meant it to be a subsisting term for the payment of his debts. He gives his leasehold estate to Montague Bertie, but without any predilection; for he gives it to whoever should be entitled to the possession of his freehold estate. He then proceeds to declare the trusts of the term which are to raise money to pay his debts and legacies; and after raising them, the term is to cease. He then disposes of the rest of his personal estate. He afterwards determines what shall be done with the personal estates in case he should have issue. In the provision which he superadds, he takes notice of the devise of the personalty, and calls it a residue; by which he means the devise of the personal estate after the specific bequest. He provides then, that if he should die leaving issue, the dispositions he had made should fail: this was not essentially necessary, though apparently so. He then makes a general provision for the discharge of the executors, who are also trustees; so that it is given them in the character of executors. It is also material to observe, that, in the special and general disposition of the personal estate to the same person who shall be entitled to the possession of the real, the personal is made to accrue to the real, which is settled with the utmost strictness. The question, then, is whether any inference is to be drawn, that he meant it should go with the

burthen the law throws upon it, or it is to be presumed that it should be exonerated, for the purpose of throwing that burthen upon the freehold estate, which he has given in the strictest manner. The inference rather seems to me to be, that he meant to protect the real estate, and therefore that the personal should bear its natural burthen. By chance he has gone further: for, where he has given directions for the indemnity of his executors, he has directed the expenses to be taken out of either the personal or real estate. He has, in that clause, arranged the estates as the law would arrange them; which affords an inference that he meant the real estate only to be in aid of the personal. I should therefore think, if the rule were, that the gift of the personal estate to a stranger was sufficient to raise a presumption that it was to be exempt from the debts, he had sufficiently here expressed his intention that it should not be so; but I take the general rule to be the other way.

I should have no doubt on the intention of the testator in this respect, if there were not another point, which I think ought to undergo a further inquiry—I mean the mortgage of the leasehold estate. The case of *Serle* v. *St. Eloy* (*e*) went upon the idea of the charge upon the real estate being the debt of the testator. If that case were recent, and had not been followed, I should have thought, upon the face of it, it was very open to argument. The difference between the cases is, that if it had been real estate mortgaged by the father, it would have been liable only as a charge; but, in the present case, the debt of the father falls upon the estate in two ways—partly as being a charge, and partly as a debt, upon the personal estate. It must be referred to the Master to consider the circumstances of the debt of £6,000, and the estate on which it was secured; and, as that point must stand over, I shall think it no impediment to the justice of the Court, to defer the decree upon the other point also.

The Master having made his report that the £6,000 was a charge upon the leasehold estate prior to the testator's having any interest in it, and that he had only covenanted for the

(*e*) 2 P. W. 386.

payment of the money upon the transfer of the mortgage from Mrs. Neate to Sir Thomas Palmer (*f*), the cause was again set down for argument on July 4, 1785, and then stood for judgment till the next day, when the Lord Chancellor pronounced his decree.

Lord Chancellor Thurlow.—Whether the personal estate should be liable, in the first instance, in exoneration of the real estate, to the payment of debts in wills of this kind, upon looking into the cases I find to be a point so slender and fine that I cannot collect any certainty upon the question; but so much uncertainty abounds, that, could the will of a testator be referred to a number of lawyers, they would probably entertain a diversity of opinions upon it.

The point ought to be fixed; and, in order to make it so, I take it, the rules have been these, and should be adhered to. In the first place, that *the personal estate is liable in the first instance to the payment of the debts*; but (in exception to this) it is agreed that the testator may, if he pleases, give his personal estate, as against his heir or any other representative, clear of the payment of his debts; and then it becomes a question, what is the mode of expression to give the personal estate exempt from such payment, when the rule of law is, that such estate is first liable. Perhaps it might have been not unwise to have adopted the rule laid down in *Fereges* v. *Robinson* (*g*)—that the testator must use *express words* for that purpose; but it is impossible to abide by the opinion given in that case, consistently with the rules in other cases. The second rule is, that *where there is a declaration plain; that shall stand in lieu of express words*. This rule has been laid down so long, and acted upon so constantly, that if other Judges were to put the construction of wills upon other grounds, how wise soever it might have been originally to have done so, it would be very unwise to make the administration of justice take a course contrary to former rules. Therefore *if there be a declaration plain, or manifestation clear, so that it is apparent, upon the face of the will, that there is*

(*f*) A further sum of £100 was, it seems, advanced to the testator. *Vide ante*, p. 3.

(*g*) Bunb. 301.

such a plain intention, the rule then is, not to disappoint, but to carry such intent into execution. But should not such intention manifestly appear, there is not a single case which does not take it for granted that the personal estate is, by law, the first fund for the payment of debts.

In regard, then, to the general intention of the will of Charles Bertie, the testator was seised of a real estate, which he had in his contemplation (exclusive of the idea of his own children), and wished to leave it to other lines of the family of Bertie; and consequently devised it to Montague Bertie, with remainder over to Peregrine Bertie for life, etc.: so far, in respect of the real estate his intention was to fix it in the name and blood of the family.

The next object he had in view was a leasehold estate, which he held under the Crown; that estate was a chattel interest, and with regard to that, he does not show such a wish to fix and continue that estate in the line of Bertie: his apparent wish was not so strong as in respect to the disposal of his real estate; for had it been so, though he could not have created an entail of his leasehold estate with limitations over, yet he might have prevented the first taker of it from alienating it. Had the testator been asked the question, whether he meant that this part of his estate should be subject to the mortgage, or to give it entire to the first taker of the real estate, or to charge the term of ninety-nine years in exoneration of the other estate, this might have been a very doubtful question, and merely conjectural, though, perhaps, he might have answered, that that estate should pay the debts; but whatever his intention was, *he has positively given it subject to the payment of the debt:* therefore, if another estate had been appropriated to payment of his debts, and this had been *his* debt upon the estate, I should have concurred with the Lords Commissioners (*h*): but in following them in that course, in which they considered it as being the clear intention in the mind of the testator, that the real estate should be so appropriated, I rather think otherwise; for it appears to me as if the testator wished it should not, and

(*h*) See *Bootle* v. *Blundell*, 1 Mer. 227; *Bickham* v. *Cruttwell*, 3 My. & C. 763.

that he chose that the leasehold estate should be so appropriated rather than to have burthened the real estate. For the mode of limiting the estate to Montague Bertie for life implies the intention of giving him a personal bounty; but, in case of failure of issue, he gives it to the next heir who should come into possession, etc. Had the real estate been expressly charged with payment of the debts, or the testator shown an anxious intention to have sacrified his real estate in preference to the leasehold or his other estate, for that purpose, by the mode of disposing of his estates, such a circumstance might have been sufficient to have turned the rule of law; and it must have been appropriated to the payment of debts, let him have charged it in any manner he pleased.

When the testator purchased this leasehold estate he purchased the equity of redemption; and the mortgage was to be considered merely as a real incumbrance upon the estate itself, and not a personal debt, as against the purchaser, according to the rules of this Court and cases decided. For *if a man purchases an equity of redemption, subject to an incumbrance, that shall be a real incumbrance following the land, and not a personal one.* The question is, whether by purchasing this estate, and assigning the mortgage from Mrs. Neate to Hoare (*i*), and covenanting for payment of debts, he did not make it his own debt. Had *Evelyn* v. *E.* (*k*) never been decided, a fair argument might have arisen upon that head; because, where a man transfers a mortgage, and covenants for the payment of the debt according to the rule of law, he makes it his own debt, and makes himself liable to be sued upon that covenant; and such a debt has priority before other simple contract debts. Now, I do not know in what Court, or by what rule, the debt would have followed the purchaser personally; but *Evelyn* v. *E.* (*l*) has decided, that though he might be at law liable, yet while there are real assets sufficient for the payment of the incumbrance, they shall be applied for that purpose; and it is to be understood with respect to such transaction, that the party did it by way of accommodating the charge, and not of

(*i*) *Qu.* Palmer. (*k*) 2 P. W. 659. (*l*) 2 P. W. 659.

making the debt his own. The difference between the estate descended and purchased is nothing, unless the circumstance of purchasing creates the difference; but that affords no argument.

The next question is, whether, when he mortgages an estate of his own as an ulterior security, that circumstance would create a difference; as if, in *Evelyn* v. *E.*, an additional real fund had been secured for making the debt good, that would have turned the judgment: it would not; for nothing makes it his debt so effectually as the covenant to pay; for it does not create the debt, but only operates as collateral to the debt. A man mortgages his estate without covenant, yet, because the money was borrowed, the mortgagee becomes a simple contract creditor, and in that case the mortgage is a collateral security; and if there is a bond or a covenant, then there is a collateral security of a higher species, but no higher by means of the mortgage merely: therefore, having such security amounts to nothing: and I have no doubt but that if the case had been stated to the Lords Commissioners, namely, that this incumbrance was not one of the testator's debts, and did not fall upon the personal estate, that they would have considered it as inherent to the leasehold estate. The argument of its not falling upon the testator answers his real intention better. But as to the real intention, I should have agreed with the Lords Commissioners, could that intention have been made clear; but the intention does not amount to a declaration plain, in any sense in which these words have been properly applied.

For the purpose of securing property and the due administration of justice in a free country, Judges ought to abide constantly by real principles, and by such beneficial rules as may afford some reasonable judgment, without applying to a superior tribunal. It is a fixed rule, that the personal estate must be first liable, unless another fund is provided; the testator must express his intention to discharge that estate from the payment of debts.

With regard to the intention apparent upon this will, it is said such intention is most anxiously limited to the raising of the term of ninety-nine years. Whether the expression be more or less, it is but subjecting the estate to the payment of debts; and it cannot extend so far as to suppose he burthened his real estate

in exoneration of the personal estate. If there had been in the gift of the personal estate words of a sufficient force, according to my notion of a declaration plain, I should not have changed the force of those words; but the intent of these words, as they stand, naturally leans to subject the personal estate to the debts. With respect to the second clause, had that stood alone, I confess that would have been liable to a degree of inference; but constructions thus picked up, and collected from more circumstances than are necessary for the purpose, are not good ways of finding out the intention of the testator; and it is better to rest upon settled rules, unless you can collect more favourable and forcible observations. With regard to the next clause, that carries more weight, because the trustees are directed to pay, not only the expense of the probate of the will, which is expressly mentioned, but to pay all the charges and expenses that should arise by proving the will, or by any other means, etc. How are these to be paid? Out of the personal estate, or the means to be raised out of the term of ninety-nine years? They have authority to pay the whole out of the personal estate—an optional clause, and empowering the executors to pay out of this fund before the other fund is ready for the purpose. He has precisely arranged the estates in the same order that the law would have done; he has made his personal estate first liable, and then the term. The true ground upon which I proceed is not upon any of these criticisms, but simply upon the rule of law, the testator not having declared by express words, or any other declaration, which would tend in law to the purpose of preserving the personal estate for any given purpose whatever. As to *Adams* v. *Meyrick* (*m*), that depended on the circumstance of the personal estate being a provision for the wife; and, therefore, the Court forced a construction upon the will, and it is, as Lord Hardwicke termed it, in *Walker* v. *Jackson* (*n*), a weak case: in the latter case, the republication of the will was an argument much relied upon. As to the cases determined upon the words "rest and residue," I could have wished his Lordship had decided upon them all, so as to have left a particular note upon each of them; for such determinations

(*m*) 1 Eq. Ca. Abr. 271.

(*n*) 2 Atk. 624.

as those cases afford have occasioned great perplexity upon the rule of law. As to *Stapleton* v. *Colville* (*o*), in that case the wife was executrix, and, exclusive of the context of the will, with regard to the option given to her to charge either fund, there never was a stronger case against charging the real estate; for he gives the whole real estate to the wife, and to be charged with debts; he wishes the continuance in his name and family, and yet charges it with the payment of the debts. Lord Talbot observed, much might arise from the examination as to the quantum of the debts and the amount of the personal estate. Lord Talbot took it as clear, that such an examination could be gone into. In *Stephenson* v. *Heathcote* (*p*), it is said expressly, no examination can be had. In that case, Lord Keeper Henley relied much upon the wife being executrix. The case was this: that the testator gave all his real estate to R. and his wife for ever, with a charge thereon for payment of debts; and, after disposing of other property, he gives a silver tobacco-box to his uncle, and all the residue he gives to his wife for ever, whom he appointed sole executrix. The Lord Keeper's observation upon this case was, that the intent of the testator was to be collected from the words of the will, and from no circumstances out of it; and, upon general principles and rules established in the cases, that the Court could not go into the testator's circumstances, as it would establish a rule not to be adhered to. The testator intended to charge his personal estate with payment of his debts, and only made his real estate an auxiliary fund: according to the rule of law, where the intent of the testator is plain, or words tantamount to express words, that is sufficient to take it out of the rule, and that it could not be the intention; for the last clause, of giving the silver tobacco-box, and then the residue to his wife, is not sufficient to show his intention to give the residue free from debts, but that the primary fund should be liable.

In the present case, I am obliged to differ from the Lords Commissioners, and consider the whole personal estate as liable to the payment of the debts; and, with respect to the leasehold estate, that the charge under which it came to the testator was

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(*o*) Cas. t. Talbot, 202.

(*p*) 1 Eden, 38, 44.

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prior to his purchasing it, and inherent in the estate, and the estate itself left liable to answer it, and that neither the personal estate nor real estate ought to be charged with that debt.

The judgment, *ex relatione.*

NOTES.

1. Generally, p. 13.
2. Cases illustrating the principle of exoneration, p. 14.
3. Exoneration of mortgaged estates prior to Real Estate Charges Acts, p. 21.
4. Real Estate Charges Acts, p. 21.
5. Order of Application of Assets, p. 25.

Preliminary.

The law on this subject has been entirely altered by the Administration of Estates Act, 1925, where the death occurs after the commencement of that Act (*q*). In the present edition of this work, therefore, the notes to the principal case which appeared in the earlier editions have been much abbreviated.

1. Generally.

The rule laid down in the principal case, viz., *that the general personal estate of a testator is the primary fund for the payment of his debts, unless it be exempted by express words or manifest intent,* has been fully recognised. But the difficulty of gathering the intent, where the exoneration of the personal estate does not depend upon express words, is very great. Certain circumstances may have more or less weight with the Court deciding the question, but such circumstances may be explained or rebutted by other parts of the will. For the *intention* of the testator, which is the thing to be got at, is to be collected from the whole will (*r*). Extrinsic evidence is not admissible (*s*), and the burden of proof lies on those who contend for exemption (*t*).

(*q*) See *infra*, pp. 22, 23, 25—28.

(*r*) Jarman (6th ed.), p. 2057; *Watson* v. *Brickwood*, 9 V. 453; *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Banks*, [1905] 1 Ch. 547; *Aldridge* v. *Wallscourt*, 1 B. & B. 312.

(*s*) *Inchiquin* v. *French*, 1 Cox, 1; *Stephenson* v. *Heathcote*, 1 Eden, 38.

(*t*) *Whieldon* v. *Spode*, 15 B. 537; *Lord* v. *Wightwick*, 1 Drew. 576; *Kilford* v. *Blaney*, 31 Ch. D. 56.

2. Cases illustrating the Principle of Exoneration.

Express Words. See cases (*u*).—It is not essential to the validity of a direction exempting a fund of personalty from payment of debts, that the fund should be specifically bequeathed, for the direction is equally good, though the fund not being disposed of falls into the residue (*x*). Where personalty is expressly exempted from payment of debts, and they are thrown upon certain real estate which proves insufficient, they cannot come upon the personalty until every other fund, even real estate settled by the will of the testator, has been exhausted (*y*). When, however, certain land is given for payment of debts in exoneration of the personalty, but without express exemption of the personalty, generally, if that land is insufficient for that purpose, the primary liability of the personalty remains for the purpose of making good the deficiency (*z*). If, moreover, the land and the residue are both given exempt from the payment of debts, on failure of other funds, the residue is primarily liable (*a*).

Exemption by Plain Intention.—Such an intention is not shown merely by a charge upon land, or a trust to sell, or the creation of a term for payment of the debts (*b*); although the charge be by deed (*c*). Nor *semble*, by a devise of real estate, upon the condition of the devisee paying the testator's debts (*d*).

A gift of the real and personal estate together will not be sufficient (*e*). But if the realty is devised upon trust for sale, and the proceeds are blended with the personalty upon trust for pay-

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(*u*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Y.*, 26 B. 522; *Dawes* v. *Scott*, 5 Russ. 32; *Forrest* v. *Prescott*, 10 Eq. 545.

(*x*) *Coventry* v. *C.*, 2 Dr. & Sm. 470.

(*y*) *Morrow* v. *Bush*, 1 Cox, 185; *Young* v. *Y.*, 26 B. 522.

(*z*) *Colvile* v. *Middleton*, 3 B. 570.

(*a*) *Brooke* v. *Warwick*, 1 H. & Tw. 142.

(*b*) *Bootle* v. *Blundell*, 1 Mer. 193; *Tower* v. *Rous*, 18 V. 132; *Brydges* v. *Phillipps*, 6 V. 567; *White* v. *W.*, 2 Vern. 43; *Inchiquin* v. *French*, 1 Cox, 1; *Tait* v. *Northwick*, 4 V. 816; *Hancox* v. *Abbey*, 11 V. 186; *Rhodes* v. *Rudge*, 1 Si. 79; *Collis* v. *Robins*, 1 De G. & Sm. 131; *Ouseley* v. *Anstruther*, 10 B. 453; *Kilford* v. *Blaney*, *supra*; and see *McCleland* v. *Shaw*, 2 Sch. & L. 538, at p. 545; *Re Banks*, [1905] 1 Ch. 547, at p. 550.

(*c*) *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*d*) *Bridgeman* v. *Dove*, 3 Atk. 201; *Mead* v. *Hide*, 2 Vern. 120; *Henry* v. *H.*, 6 Ir. R. Eq. 286.

(*e*) *Boughton* v. *B.*, 1 H. L. Cas. 406; *Tench* v. *Cheese*, 6 De G. M. & G. 453.

ment of debts, the realty and personalty are liable rateably for that object (*f*).

The rule, however, of rateable payment does not extend beyond the things which the testator has expressly directed to be paid out of the blended fund. Thus, where a testator gives the residue of his real and personal estate upon trust for sale, and directs payment thereout of his "debts, funeral, and testamentary expenses"—not mentioning legacies—although by the use of the word "residue" any legacies given by the will, whether before or after the gift of residue, are charged on the real estate, such charge is treated as only in aid, leaving the personalty the primary fund for payment of the legacies (*g*). A charge of legacies upon the real estate of the testator will not make specifically devised real estate liable for the payment of legacies (*h*).

But the rule of rateable payment will apply where a payment is directed to be made out of the rents and profits of an aliquot *share* of real and personal estate (*i*); for as there are no burdens regularly incident to a *share* of personalty, there is no *prima facie* liability to be negatived, and the devisees take subject to the burthen imposed by the will, irrespective of any legal presumption.

And so also where the surplus of a fund made up of the rents and profits of the testator's real estate (unconverted) and the income of his residuary personal estate, was after payment of annuities thereout, given to persons other than those becoming entitled subject to the trusts for payment to the real estate, the real and personal estates were held liable rateably to payment of the annuities (*k*).

Charging Funeral and Testamentary Expenses, etc., on Land.—A mere charge of funeral or testamentary expenses, or of both, in addition to debts upon real estate, although a strong circumstance (*l*), will not exempt the personalty, unless there are other

(*f*) *Roberts* v. *Walker*, 1 Russ. & M. 752; *Dunk* v. *Fenner*, 2 Russ. & M. 557; *Ashworth* v. *Munn*, 34 Ch. D. 391; *Re Spencer Cooper*, [1908] 1 Ch. 130; *Re Balls*, [1909] 1 Ch. 791; *Allan* v. *Gott*, L. R. 7 Ch. 439; *Re Boards*, [1895] 1 Ch. 499; *Bright* v. *Larchner*, 3 De G. & J. 148; *Simmons* v. *Rose*, 6 De G. M. & G. 411; *Shallcross* v. *Wright*, 12 B. 505.

(*g*) *Elliott* v. *Dearsley*, 16 Ch. D. 322; *Greville* v. *Browne*, 7 H. L. Cas. 689.

(*h*) *Conron* v. *C.*, 7 H. L. Cas. 168; *Spong* v. *S.*, 3 Bli. 84; and see *Bank of Ireland* v. *McCarthy*, [1898] A. C. 181.

(*i*) *Falkner* v. *Grace*, 9 Ha. 282.

(*k*) *Howard* v. *Dryland*, 38 L. T. (N.S.) 24, distinguishing *Boughton* v. *B.*, 1 H. L. C. 406.

(*l*) *Burton* v. *Knowlton*, 3 V. 107; *Re Banks*, [1905] 1 Ch. 547.

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words in the will which exhibit beyond reasonable doubt the intention of the testator to exonerate it (*m*).

The fact that the real estate charged with payment of debts and legacies is situate abroad does not affect the rule as to the personalty being the primary fund for payment (*n*). But where the charge covers personal estate comprised in a specific bequest, then as between such personal estate and the residuary estate, the residuary estate is exempted from primary liability (*n*).

Personal Estate bequeathed Specifically, not as a Residue.—The distinction between a mere residuary bequest, and a gift of *all* the personal estate, has been considered important (*o*). And where the personalty has been bequeathed, not as a residue, but as a whole, and *the debts and funeral and testamentary expenses* have been made payable out of the real estate devised in trust for sale, the real estate has been held the primary fund for their payment (*p*). The same principle applies to *legacies*, where the funeral and testamentary charges and also legacies are thrown upon the real estate, and the personal estate is not bequeathed as a residue, for then the real estate will be the primary fund for their payment (*q*).

So where the personal estate has been bequeathed in general terms, although not as a residue, and the debts, funeral and testamentary expenses, have been thrown upon a particular estate, devised upon trust for their payment, such particular estate will be the primary fund for their payment; and it has been held that if such particular estate is insufficient, and if other real estate has been specifically devised, not charged with debts, such real estate and the personal estate must contribute rateably towards the payment of the debts (*r*). The principle does not apply where real estate, although charged with payment of the testator's debts,

(*m*) *Kilford* v. *Blaney*, 31 Ch. D. 56; *Brydges* v. *Phillipps*, 6 V. 567; *Stephenson* v. *Heathcote*, 1 Eden, 38; *Aldridge* v. *Wallscourt*, 1 Ball. & B. 312; *Tait* v. *Northwick*, 4 V. 816; *Gray* v. *Minnethorpe*, 3 V. 103; *Hartley* v. *Hurle*, 5 V. 540; *Rhodes* v. *Rudge*, 1 Si. 79; *McCleland* v. *Shaw*, 2 Sch. & L. 538; *Coote* v. *C.*, 3 Jo. & Lat. 175; *Bootle* v. *Blundell*, 1 Mer. 193.

(*n*) *Re Smith*, [1913] 2 Ch. 216.

(*o*) *Tower* v. *Rous*, 18 V. 138; *Bootle* v. *Blundell*, 1 Mer. 228.

(*p*) *Greene* v. *G.*, 4 Madd. 148; *Michell* v. *M.*, 5 Madd. 69; *Driver* v. *Ferrand*, 1 Russ. & M. 681; *Blount* v. *Hipkins*, 7 Si. 43; *Kilford* v. *Blaney*, 31 Ch. D. 56; *Plenty* v. *West*, 16 B. 173; *Gilbertson* v. *G.*, 34 B. 354; see *Re Banks*, [1905] 1 Ch., at p. 550.

(*q*) *Jones* v. *Bruce*, 11 Si. 221; *Coote* v. *C.*, 3 Jo. & Lat. 175; *Lance* v. *Aglionby*, 27 B. 65; *Re Banks*, *supra*; *Robertson* v. *Broadbent*, 8 A. C. 812.

(*r*) *Powell* v. *Riley*, 12 Eq. 175; dissented from in *Re Ovey*, 51 L. J. Ch. 667; 20 Ch. D. 676; and see *Re Green*, 40 Ch. D., at p. 613.

funeral and testamentary expenses is not devised in trust to pay the same (*s*).

A bequest of *all* the personal estate (with or without an enumeration of particulars), as distinguished from a general residuary bequest, will not, *where the legatee is also appointed executor*, exonerate the personalty passing under such bequest, although lands are devised in trust to pay all the testator's debts (*t*); and the result appears to be the same where the legatee is not appointed executor (*u*).

The inference against the exoneration of the personal estate, when the legatee is also the executor, arises upon the assumption that he takes the personal estate in that character, with all the burthens attached to it, in a regular course of administration.

Personal Estate expressly Charged.—An express charge of some particular debts, as simple contract debts, or legacies on the personalty for the payment of which, without such charge, it would be primarily liable, will not raise a presumption, founded on the maxim "expressio unius est exclusio alterius," that it is only to be the auxiliary fund for payment of other charges not expressly charged upon it, but which are charged upon the land (*x*).

Certain Expressions amounting to Exoneration.—In *Webb* v. *Jones* (*y*) the testator devised his real estate to be sold, and the money to arise by the sale to be applied to pay mortgages and all other debts, *the residue to be added to his personal estate;* Kenyon, M.R., held the personal estate to be exonerated, upon the ground that the testator clearly showed that he did not contemplate the possibility of the whole personalty being applied before the realty,

(*s*) *Re Banks*, [1905] 1 Ch. 547, 550.

(*t*) *French* v. *Chichester*, 2 Vern. 568; *Harewood* v. *Child*, Cas. t. Talbot, 204; *Haslewood* v. *Pope*, 3 P. W., at pp. 324, 325; *Brummel* v. *Prothero*, 3 V. 111; *Trott* v. *Buchanan*, 28 Ch. D. 446; *Aldridge* v. *Wallscourt*, 1 Ball & B. 312. The cases, therefore, of *Kynaston* v. *K.*, 1 Bro. Ch. 457; *Holiday* v. *Bowman*, 1 Bro. Ch. 145; *Bampfield* v. *Wyndham*, Pr. Ch. 101, cited in the principal case, may be considered as overruled.

(*u*) *Collis* v. *Robins*, 1 De G. & Sm. 131; *Ouseley* v. *Anstruther*, 10 B. 453; cf. *Greene* v. *G.*, 4 Madd. 148; *Kilford* v. *Blaney*, 31 Ch. D. 56; see *Re Banks*, [1905] 1 Ch. 547.

(*x*) *Watson* v. *Brickwood*, 9 V. 453, and see Lord Eldon's comment on this case in *Bootle* v. *Blundell*, 1 Mer., at p. 230; see also *Howe* v. *Dartmouth*, *infra*, *Brydges* v. *Phillips*, 6 V. 567; *Davies* v. *Ashford*, 15 Si. 42; but see *Anderton* v. *Cooke*, 1 Bro. Ch. 456; *Williams* v. *Llandaff*, 1 Cox, 254; *Dawes* v. *Scott*, 5 Russ. 32; *Re Butler*, [1894] 3 Ch. 250.

(*y*) 2 Bro. Ch. 60; 1 R. R. 29.

which it might have been if it was to be applied in its natural order (*z*).

So there is exoneration where a testator declares that he has charged his lands with the payment of his debts in order that the personalty may *come clear to the legatee* (*a*), or where he has directed the proceeds of his real estate to be applied "in part payment" of certain legacies (*b*).

In *Dawes* v. *Scott* (*c*) a testator devised an estate at C., and bequeathed certain specific chattels, upon trust to sell, and in the first place to pay all his just debts, funeral and testamentary expenses and legacies, and after giving some pecuniary legacies, declared that the moneys to arise by such sale as aforesaid, *should be* "*the fund primarily applicable* to the discharge of his said debts, funeral and testamentary expenses and legacies." And in case it should be insufficient, by a codicil charged his H. estate "with the payment of so much money as should be requisite to make good the deficiency"; it was held by Leach, M.R., that the personal estate was only liable after the two estates had been exhausted; "for the C. estate and the articles to be sold therewith, are expressed to be the primary fund, and the plain intention of the testator is, that the H. estate should be the secondary fund" (*d*).

Lapse.—Where the testator has exempted personalty which he has bequeathed from its primary liability to debts, the exemption will not be extended for the benefit of next-of-kin who take the personalty in consequence of a lapse. In *Waring* v. *Ward* (*e*), Arden, M.R., puts this case. "If an estate be given to A and the personal estate to B exempt from debts, that exemption is to be considered as intended only for the benefit of B, that he shall not pay those debts to which he would be liable if no such provision had been made; and is not a general exemption of the personal estate." It follows, therefore, that on the death of B, the next-of-kin who took the personal estate would take it subject to the

(*z*) And see *Shallcross* v. *Wright*, 12 B. 505; *Fisher* v. *F.*, 2 Keen, 610; but see *Wythe* v. *Henniker*, 2 My. & K. 635.

(*a*) *March* v. *Fowke*, Cas. t. Finch, 414.

(*b*) *Bunting* v. *Marriott*, 19 B. 163.

(*c*) 5 Russ. 32.

(*d*) And see *Bateman* v. *Roden*, 1 Jo. & Lat. 356; *Evans* v. *E.*, 17 Si. 102; *Forrest* v. *Prescott*, 10 Eq. 545; *Bootle* v. *Blundell*, 1 Mer. 193; *Kilford* v. *Blaney*, 31 Ch. D. 56; *Re Needham*, 54 L. J. Ch. 75; *Trott* v. *Buchanan*, 28 Ch. D. 446.

(*e*) 5 V., at p. 675.

payment of the debts (*f*). But if the personalty exempted has not been bequeathed to anyone, it is exempted for all purposes, and, therefore, for the benefit of the next-of-kin (*g*).

Charge of, or Trust to pay Legacies.—Where there is a simple gift of an annuity or legacy, followed by a charge thereof upon the real estate, the personal estate in such case is primarily liable, and the real estate is only charged in aid of the personal estate (*h*). So where there is a *general charge of legacies* upon land, or a devise in trust to pay *legacies* generally, the personal estate will be the primary fund for their payment (*i*).

Trust to Pay Certain Legacies.—Where there is a *trust* to sell and pay *particular sums* out of the proceeds of real estate, such sums are considered as part of the real estate, and the personal estate will not be liable to the payment, even upon a deficiency of the real estate (*k*). Nor will it even though there be a direction at the end of the will, that the personal estate should be applied in payment of *legacies* in exoneration of the real estate (*l*).

And should the testator sell the estate out of which a sum is to be paid, the legacy will be adeemed (*m*). It is otherwise, however, in the case of a *demonstrative* legacy (*n*).

Trust to Pay Certain Debts.—It has been held that a devise of real estate, upon trust to raise *a certain sum for payment of debts* (*o*), or to pay a particular debt to which the personal estate

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(*f*) *Hale* v. *Cox*, 3 Bro. Ch. 322; *Noel* v. *Henley*, 7 Price, 241; *Kilford* v. *Blaney*, 31 Ch. D. 56; and see *Re Grainger*, [1900] 2 Ch. 756.

(*g*) *Milnes* v. *Slater*, 8 V. 295; *Fisher* v. *F.*, 2 Keen, 610; *Dacre* v. *Patrickson*, 1 Dr. & Sm. 186; cf. *Re Kirk*, 21 Ch. D. 431.

(*h*) *Paget* v. *Huish*, 1 Hem. & M. 663; and see *Re Trenchard*, [1905] 1 Ch. 82; *Re Spencer Cooper*, [1908] 1 Ch. 130.

(*i*) *Kirke* v. *K.*, 4 Russ. 449; *Roberts* v. *R.*, 13 Si. 349; *Ouseley* v. *Anstruther*, 10 B. 453; *Re Ovey*, 31 Ch. D., at p. 118.

(*k*) *Hancox* v. *Abbey*, 11 V. 179; *Gittins* v. *Steele*, 1 Sw. 24; *Dickin* v. *Edwards*, 4 Ha. 273; *Bateman* v. *Roden*, 7 Ir. Eq. R. 240; but see *Jones* v. *Bruce*, 11 Si. 221; *Evans* v. *E.*, 17 Si. 102.

(*l*) *Spurway* v. *Glynn*, 4 V. 483.

(*m*) *Newbold* v. *Roadnight*, 1 Russ. & M. 677.

(*n*) *Mann* v. *Copland*, 2 Madd. 232; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Willox* v. *Rhodes*, 2 Russ. 452; *Sidebotham* v. *Watson*, 11 Ha. 170; *Colvile* v. *Middleton*, 3 B. 570; *Fream* v. *Dowling*, 20 B. 624; 4 Eq. 145, n.; *Williams* v. *Hughes*, 24 B. 474; *Paget* v. *Huish*, 1 Hem. & M. 663; *Coard* v. *Holderness*, 22 B. 391; *Gordon* v. *Duff*, 28 B. 519; and note to *Ashburner* v. *Macguire*, *post*.

(*o*) *Clutterbuck* v. *C.*, 1 My. & K. 15.

is already liable, will render the real estate the primary fund for the payment of such sums (*p*). The correct view, however, would seem to be that the charge of a debt by a testator on real estate not already charged with the same will not affect the primary liability of the personal estate (*q*), excepting where the testator has likewise imposed the payment of the debt as a *personal obligation* on the devisee (*r*).

Charge of Debts on Specific Fund.—Where a specific personal fund is subjected to charges which otherwise would fall upon the general personal estate, as debts, legacies, funeral and testamentary expenses, such specific fund will not be the auxiliary fund for their payment as in the case of land, see *supra*, but the primary fund (*s*). If, however, the residue is undisposed of, it will be primarily liable (*t*).

Although the payment of debts is thrown by a testator upon a particular fund, and he devises or bequeaths other property discharged from such debts, if the particular fund should prove insufficient for payment of debts, the other property will be applicable for that purpose in the usual order (*u*).

Trust affecting Legatee.—In *Re Maddock* (*x*) a testatrix devised her real estate and the residue of her personalty to X, and by a memorandum not attested as a will imposed a binding trust upon X as to a specified portion of her residuary personal estate in favour of certain persons; it was held by the Court of Appeal that for the purposes of administration the specified portion of the residue must be treated as specifically bequeathed, and that after exhaustion of the balance of the residue the debts must be borne rateably by the real estate and the specified portion (*x*).

(*p*) *Hancox* v. *Abbey*, 11 V. 179; *Welby* v. *Rockcliffe*, 1 Russ. & M. 571; *Evans* v. *Cockeram*, 1 Coll. Ch. R. 428; *Bateman* v. *Roden*, 1 Jo. & Lat. 356; *Coote* v. *C.*, 3 Jo. & Lat. 175.

(*q*) *Quennell* v. *Turner*, 13 B. 240; *Bickham* v. *Cruttwell*, 3 My. & C. 763; *Noel* v. *Henley*, 7 Pri. 241; Jarman (6th ed.), 2071-4.

(*r*) *Welby* v. *Rockcliffe*, 1 Russ. & M. 571; *Clutterbuck* v. *C.*, 1 My. & K. 15.

(*s*) *Choate* v. *Yeates*, 1 J. & W. 102; *Phillips* v. *Eastwood*, 1 L. & G. t. Sugden, 294; *Evans* v. *E.*, 17 Si. 102; *Webb* v. *De Beauvoisin*, 31 B. 573; *Coventry* v. *C.*, 2 Dr. & Sm. 470; *Bootle* v. *Blundell*, 1 Mer. 193; *Re Butler*, [1894] 3 Ch. 250.

(*t*) *Hewett* v. *Snare*, 1 De G. & Sm. 333; *Holford* v. *Wood*, 4 V. 76; *Newbegin* v. *Bell*, 23 B. 386; *Corbett* v. *C.*, 8 Ir. R. Eq. 407; *Re Hastings*, 55 L. J. Ch. 278.

(*u*) *Brooke* v. *Warwick*, 1 H. & Tw. 142, 148.

(*x*) [1902] 2 Ch. 220.

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3. Exoneration in respect of Mortgaged Estates prior to the Real Estate Charges Acts.

The law previous to these Acts is fully stated in Jarman (6th ed.), pp. 2039 *et seq.*, and in the early editions of this work. The following is a short statement of it; where the secured debt was the debt of the deceased himself, the principle of the primary liability of the personal estate was fully applied, and was not excluded either by a devise of the mortgaged land subject to the mortgage (*y*) or by a devise of land upon trust to sell and pay mortgages (*z*). The same principles were applied in the case of a vendor's lien (*a*).

But in the following cases the mortgaged estate was held primarily liable :

(1) Where the mortgaged debt was not the personal debt of the devisor or ancestor, and had not been adopted by him (*b*).

(2) Where there had been no benefit from the charge to the personalty of the person creating it (*c*).

(3) Or where there had been a benefit to the personal estate but the inference from the circumstances was that the land was to be primarily liable (*d*).

4. The Real Estate Charges Acts, 1854, 1867, and 1877.

These Acts have been repealed by the Administration of Estates Act, 1925, but not so as to affect cases where the death occurred before the commencement of that Act (January 1, 1926). Their effect may be shortly stated as follows :—

By the Act of 1854 (17 & 18 Vict. c. 113), generally known as Locke King's Act, it was provided that where a person dies seised of land or other hereditaments which are charged with a mortgage

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(*y*) *Serle* v. *St. Eloy*, 2 P. W. 386; *Bootle* v. *Blundell*, 1 Mer. 193; *Goodwin* v. *Lee*, 1 K. & J. 377; 1 Jur. (N.S.) 948.

(*z*) *Wythe* v. *Henniker*, 2 My. & K. 635; but see *Webb* v. *Jones*, 2 Bro. Ch. 60; 1 R. R. 69.

(*a*) *Yonge* v. *Furse*, 20 B. 380.

(*b*) *Scott* v. *Beecher*, 5 Madd. 96; *Swainson* v. *S.*, 6 De G. M. & G. 648, and the principal case, p. 1.

(*c*) *Coventry* v. *C.*, 2 Dr. & Sm. 470; *Lanoy* v. *Athol*, 2 Atk. 444; *Loosemore* v. *Knapman*, Kay, 123.

(*d*) *Jenkinson* v. *Harcourt*, Kay, 688; *Vandeleur* v. *V.*, 3 Cl. & Fin. 82; *Barham* v. *Clarendon*, 10 Ha. 126; but see *Redington* v. *R.*, 1 Ball & B. 131.

and shall not have signified a contrary intention, the heir or devisee shall not be entitled (as between the different persons claiming under the deceased) to have the debt discharged out of the personal estate or any other real estate of such person, but the land so charged shall be primarily liable to the mortgage debt, every part thereof, according to its value, bearing a proportionate part of the mortgage debt charged on the whole. But nothing therein contained is to affect the rights of the mortgagee. Leaseholds were held not to be "hereditaments" within the meaning of this Act (*e*), and a vendor's lien was held not to be a "mortgage" within the Act (*f*).

By the Act of 1867 (30 & 31 Vict. c. 69) it was enacted that a general direction for payment of a testator's debts out of his personal estate should not be deemed a declaration of an intention contrary to the rule established by the Act of 1854, unless such intention is further declared by words referring to all or some of the testator's debts charged by way of mortgage on some part of the testator's real estate.

By the Act of 1877 (40 & 41 Vict. c. 34) the provisions of the Acts of 1854 and 1867 were made applicable to hereditaments of any tenure, and by the Acts of 1867 and 1877 the word "mortgage" in the Act of 1854 in those Acts was made to include a vendor's lien.

By the Administration of Estates Act, 1925, s. 35, it is provided as follows :—

"35.—(1) Where a person dies possessed of, or entitled to, or, under a general power of appointment (including the statutory power to dispose of entailed interests) by his will disposes of, an interest in property, which at the time of his death is charged with the payment of money, whether by way of legal mortgage, equitable charge or otherwise (including a lien for unpaid purchase-money), and the deceased has not by will deed or other document signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof.

(*e*) *Soloman* v. *S.*, 33 L. J. Ch. 473.
(*f*) *Hood* v. *H.*, 5 W. R. 74.

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" (2) Such contrary or other intention shall not be deemed to be signified—

" (a) by a general direction for the payment of debts or of all the debts of the testator out of his personal estate, or his residuary real and personal estate, or his residuary real estate; or

" (b) by a charge of debts upon any such estate;

unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.

" (3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise."

It is important to observe that this section extends the principle of the Real Estates Charges Acts to bequests of personal estate. Under the words " as between the different persons claiming through or under the deceased person " in Locke King's Act—which correspond to the words " as between the different persons claiming through the deceased " in the Act of 1925—it was held that the Act did not apply where a partner had created a charge on his separate real estate to secure a partnership debt and at the time of his death the partnership assets were sufficient to answer all the debts of the partnership (*g*).

In *Dacre* v. *Patrickson* (*h*), it was argued that the Crown taking the personal estate of an intestate in default of next-of-kin could not claim the benefit of Locke King's Act, since the Crown was not a person " claiming through or under the deceased." But this argument was rejected by Kindersley, V.-C., who held that the Crown was entitled to take the personal estate free from a mortgage on the real estate which was to be paid out of the land charged therewith.

Under the words " every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof "—which correspond to the words " every part of the said interest, according to its value, shall bear a proportionate part of the charge on the whole thereof " in the Act of 1925—it was held that where freeholds and leaseholds, or other personal estate, such as policies of assurance, are mortgaged together, on the death of the mortgagor, the real and personal estate, unless a contrary intention be expressed, must bear the

(*g*) *Re Ritson*, [1899] 1 Ch. 128; and see *Anthony* v. *A.*, [1893] 3 Ch. 501.
(*h*) 1 Dr. & Sm. 186; cf. *Kilford* v. *Blaney*, 31 Ch. D. 56.

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burden rateably (*i*). Where a further security is given at a subsequent time, nevertheless, *prima facie*, the two properties must contribute rateably towards payment of what is due (*k*). And the mere statement in the further security that it is "collateral" is not sufficient to show that it was intended that property comprised in a former mortgage should be primarily liable (*l*), although where that word was used, it was held, as *the result of the whole transaction*, that one property was not to be called upon to provide for payment of part of the debt until the other was exhausted (*m*). It is now established that where property is subject to a mortgage, and part is devised to specific, and part to residuary devisees (both devises being now considered specific), each part of the estate must contribute rateably (*n*).

But it has been held under Locke King's Act that where a contrary intention has been shown by the substitution of another fund for the exoneration of the property in mortgage, if the fund be insufficient to pay off the mortgage, the deficiency must be borne by the mortgaged estate (*o*); effect is to be given to the contrary intention as shown by the will and no further (*p*).

Since the passing of the Act of 1867 it has been held that if a testator wishes to give a direction which shall be deemed a direction contrary to the rule laid down in Locke King's Act, it must be a direction applying to his mortgage debts in such terms as unmistakably refer to or describe them (*q*). It will be observed that under the Act of 1867 a general direction by a testator that his debts shall be paid out of his personal estate, is not to be deemed a declaration of a contrary or other intention within Locke King's Act "unless such contrary or other intention shall be further declared by words expressly or by necessary implication

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(*i*) *Evans* v. *Wyatt*, 31 B. 217; *Trestrail* v. *Mason*, 7 Ch. D. 455; *Re Newmarch*, 9 Ch. D. 17; *Leonino* v. *L.*, 10 Ch. D. 460.

(*k*) *Leonino* v. *L.*, 10 Ch. D. 460; *De Rochfort* v. *Dawes*, 12 Eq. 540; *Athill* v. *A.*, 16 Ch. D. 211; *Re Pimm*, 91 L. T. 190, reported on other points, [1904] 2 Ch. 350.

(*l*) *Athill* v. *A.*, *supra*; *Early* v. *E.*, 16 Ch. D. 214 (n.); *Leonino* v. *L.*, *supra*.

(*m*) *Bute* v. *Cunynghame*, 2 Russ. 275.

(*n*) *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; *Sackville* v. *Smyth*, 17 Eq. 153, dissenting from *Brownson* v. *Lawrance*, 6 Eq. 1; *Re Smith*; *Hannington* v. *True*, 33 Ch. D. 195.

(*o*) *Rodhouse* v. *Mold*, 35 L. J. Ch. 67; *Gall* v. *Fenwick*, 43 L. J. Ch. 178; but cf. *Smith* v. *Moreton*, contra, 37 L. J. Ch. 6; *Allen* v. *A.*, 30 B. 403; *Greated* v *G.*, 26 B. 621.

(*p*) *Re Birch*, [1909] 1 Ch. 787.

(*q*) *Nelson* v. *Page*, 7 Eq. 25.

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referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate." Under the Act of 1925 a direction for payment of a testator's debts out of his personal estate, etc., is not to be deemed a contrary intention "unless such intention is further signified by words expressly or by necessary implication referring to all or some part of *the charge*." It will thus be seen that in order to exempt a mortgaged property from bearing the debt charged thereon the contrary intention must be shown by a reference to the particular charge. In a case where F. directed his private debts to be paid out of the proceeds of certain policies, and bequeathed his residue subject to payment of his trade debts, and after the date of his will deposited title deeds of real estate with his bankers, to secure overdrawn account, it was held that he had made a particular specific provision which excluded the Act (*r*). A direction to pay debts "except mortgage debts if any on Blackacre" out of residue, implies that other mortgage debts are to be paid out of residue (*s*).

5. Order of Application of Assets.

The rules determining the order in which assets are administered in satisfaction of debts have lost much of their importance, the difference in the descent of real and personal estate having been abolished by the Administration of Estates Act, 1925. The order in which assets were administered before the Act of 1925—which applies to all deaths before January 1, 1926—is set out in the last preceding edition of this work as follows :—

(1) The general personal estate, or residuary personalty, not specifically bequeathed or exonerated (*t*).

(2) Real estate devised in trust for payment of debts (*u*).

(3) Real estate descended (*x*), whether possessed by the testator at the date of his will or acquired after (*y*).

(4) Real or personal property charged with payment of debts and devised, or specifically bequeathed subject to such

(*r*) *Re Fleck*, 37 Ch. D. 677; *Re Nevill*, 59 L. J. Ch. 511; *Re Campbell*, [1893] 2 Ch. 206; *Thompson* v. *Bell*, [1903] 1 Ir. R. 489.

(*s*) *Re Valpy*, [1906] 1 Ch. 531.

(*t*) See the principal case, and cf. *Re Bate; Sellon* v. *Watts*, *infra*; *Re Ovey*, 8 A. C. 812; 31 Ch. D. 113; *Trott* v. *Buchanan*, *supra*, p. 14.

(*u*) *Harmood* v. *Oglander*, 8 V. 124; *Phillips* v. *Parry*, 22 B. 279.

(*x*) *Harmood* v. *Oglander*, *supra*.

(*y*) *Milnes* v. *Slater*, 8 V. 304.

charge, rateably *inter se* (*z*). Where part of the property charged lapses, the lapsed share contributes rateably (*a*), and is not liable until after descended estate.

(5) General pecuniary legacies *pro rata* and demonstrative legacies in so far as there is a deficiency in the designated fund (*b*).

(6) Specific and residuary devises, and specific bequests, not charged with debts, rateably *inter se* (*c*). But when a specific bequest is made which has been charged with a debt in the lifetime of the testator, then, although the real estate is charged with the payment of debts, the property so specifically bequeathed must first be applied in payment of the particular debt charged upon it (*d*).

(7) Real and personal estate appointed by will under a general power of appointment (*e*). Where, however, a power of appointment is exercised by a general bequest the property subject to the power passes as forming a part of the bequest, and not as on an express exercise of the power, and is therefore not necessarily postponed to other assets of the testator (*f*).

(8) Widows' paraphernalia, if now capable of existing (*g*).

Section 34 of the Administration of Estates Act, 1925, provides—

"34.—(1) Where the estate of a deceased person is insolvent, his real and personal estate shall be administered in accordance with the rules set out in Part I of the First Schedule to this Act.

"(3) Where the estate of a deceased person is solvent, his real and personal estate shall, subject to rules of Court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be

(*z*) *Wride* v. *Clarke*, 2 Bro. Ch. 261; *Harmood* v. *Oglander; Re Salt*, *infra*; and see *Re Butler*, [1894] 3 Ch. 250.

(*a*) *Wood* v. *Ordish*, 3 Sm. & G. 125.

(*b*) *Tomkins* v. *Colthurst*, 1 Ch. D. 626; *Farquharson* v. *Floyer*, 3 Ch. D. 109; *Sellon* v. *Watts*, 20 B. 519; Seton (7th ed.), p. 1606; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834; *Re Kempster*, [1906] 1 Ch. 446; *Re Bate*, 43 Ch. D. 600, must be considered overruled.

(*c*) *Manning* v. *Spooner*, 3 V. 117; *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136; *Re Maddock*, [1902] 2 Ch. 220.

(*d*) *Re Butler*, [1894] 3 Ch. 250; and cf. *O'Neal* v. *Mead*, 1 P. W. 693; *Halliwell* v. *Tanner*, 1 Russ. & M. 633.

(*e*) *Jenney* v. *Andrews*, 6 Madd. 264; *Fleming* v. *Buchanan*, 3 De G. M. & G. 976; *Beyfus* v. *Lawley*, [1903] A. C. 411.

(*f*) *Williams* v. *W.*, [1900] 1 Ch. 152.

(*g*) *Masson-Templier* v. *De Fries*, 25 T. L. R. 784.

applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act."

The First Schedule to the Act is in the following terms :—

"*Part I.*

"Rules as to payment of debts where the estate is insolvent.

"1. The funeral, testamentary and administration expenses have priority.

"2. Subject as aforesaid, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the assets of persons adjudged bankrupt."

"*Part II.*

"Order of application of assets where the estate is solvent.

"1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.

"2. Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid.

"3. Property of the deceased specifically appropriated or devised or bequeathed (either by a specific or general description) for the payment of debts.

"4. Property of the deceased charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts.

"5. The fund, if any, retained to meet pecuniary legacies.

"6. Property specifically devised or bequeathed, rateably according to value.

"7. Property appointed by will under a general power, including the statutory power to dispose of entailed interests, rateably according to value.

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"8. The following provisions shall also apply—

"(a) The order of application may be varied by the will of the deceased.

"(b) This part of this Schedule does not affect the liability of land to answer the death duty imposed thereon in exoneration of other assets."

It will be observed that in the above statement of the order in which, under the Act of 1925, assets are to be applied for the payment of debts, the words "Property of the deceased" are used, no distinction being drawn between real and personal estate.

Marshalling of Assets.—If the above-mentioned order has been disturbed by any creditor, equity will marshal the assets (*h*).

(*h*) See *Aldrich* v. *Cooper*, *infra*.

ALDRICH *v.* COOPER.
DURHAM *v.* LANKESTER.
DURHAM *v.* ARMSTRONG.

1803. 8 V. 381 : 7 R. R. 86.

Marshalling.

Mortgagee of freehold and copyhold estates, also a specialty creditor, having exhausted the personal assets, simple contract creditors are entitled to stand in his place pro tanto against both the freehold and copyhold estates.

Mortgage of freehold estate, with a covenant for better securing the payment, to procure admission and to surrender a copyhold estate, and in the meantime to stand seised in trust for the mortgagee. A primary mortgage of both estates; and the freehold not first applicable.

In these causes the usual decree was made for an account of what was due to the plaintiff Aldrich, a simple contract creditor of the intestate John Cooper, and all other the creditors; and, in case the creditors by specialty should exhaust any part of the personal estate, it was declared that the simple contract creditors were entitled to stand in their place, etc.

The Master's report stated that the intestate died seised of freehold estates of inheritance, subject to a mortgage made by him, by indentures dated October 6, 1791, for £1,300; by which indentures also, for better securing the payment, he covenanted with the mortgagee to procure himself to be admitted to copyhold estates, and that he would surrender them to the mortgagee; and that until such surrender he would stand seised of the premises in trust for the mortgagee.

The intestate died in June, 1792, not having been admitted to the copyhold estates, leaving five sisters his coheiresses-at-law, who, in September, 1792, were admitted to the copyhold estates as co-heiresses of the intestate, and immediately afterwards surrendered to the mortgagee for securing what was due upon the mortgage and two bonds by the intestate to the mortgagee. The

widow of the intestate took out administration, and paid out of the personal estate £767 in part of the mortgage and bonds. The personal estate being exhausted when the cause came on for further directions, a question arose *whether the creditors by simple contract were entitled to stand in the place of the specialty creditors in respect of what they had drawn from the personal estate, against the copyhold as well as the freehold estates.*

Mr. Romilly, for the plaintiff, said that if the question as against the copyhold estate could be considered open, the principle is, that where a creditor who has two funds chooses to resort to the only fund upon which other creditors can go, they shall stand in his place for so much, against the fund to which they otherwise could not have access; but he admitted this case could not be distinguished from *Robinson* v. *Tonge* (*a*).

Mr. Piggott, for the coheiresses, relied upon the circumstance that the only act as to the copyhold estate was the covenant for farther security to be admitted, and to surrender to the mortgagee, and in the meantime to stand seised in trust for him; showing the intention that the freehold estate should be first applied, as the primary fund—the copyhold being only a subsidiary security.

Lord Chancellor Eldon.—The words, "for better securing the payment," are not thrown in for the purpose of making the freehold estate applicable first; but the common form of a mortgage of freehold and copyhold estates is to make the freehold liable, with a covenant to surrender the copyhold, in order to save the fine.

It is necessary to look into the case that has been cited. Freehold estates are not assets for simple contract debts (*b*); and I should have thought the same reasoning that governs that case, would have applied to this.

(*a*) Stated in Mr. Cox's note, 1 P. W. 680 (5th ed.).

(*b*) But see since this case 3 & 4 Will. 4, c. 104, and the Administration of Estates Act, 1925.

Aldrich v. Cooper.

Dec. 7, 8, 1802.

Mr. Romilly and Mr. Stratford for the plaintiffs, commented upon *Robinson* v. *Tonge*; which they admitted could not be distinguished from this case, and cited *Lanoy* v. *Athol* (*d*); *Tipping* v. *T.* (*e*); *Lutkins* v. *Leigh* (*f*); *Forrester* v. *Leigh* (*g*).

Mr. Piggott and Mr. Fonblanque for the defendants, insisted upon *Robinson* v. *Tonge*.

Mr. Romilly, in reply * * * * It is objected that marshalling is merely a distribution of the different assets by such an arrangement as will satisfy all the creditors, and that copyhold estate is not assets. But that which is called *marshalling* is merely that rule with respect to the two funds, stated by Lord Hardwicke in *Lanoy* v. *Athol*, and is called *marshalling assets* merely as being generally applied to a case of assets. But the doctrine is applied to other cases; where the parties are living; as the case, mentioned in *Lanoy* v. *Athol*, of the two mortgages. So, where the Crown, by an extent, has taken a mortgaged estate and deprived the mortgagee of his security, the Court of Exchequer has marshalled in his favour by letting him stand in the place of the Crown upon other funds not comprised in his mortgage. Another instance is the case of a surety who is put in the place of the creditor against the other securities, though he has no charge against them. That is the common equity: *Tynt* v. *T.* (*h*), and *Dering* v. *Winchelsea* (*i*); in which each surety had given a distinct security. The same principle is applied in all these cases * * *.

Lord Chancellor Eldon.—I cannot yet find this case (*k*) among Lord Hardwicke's notes. I feel it to be my duty to understand the principle of the case, before I confirm it; or to decide against it upon a principle stated from this place, so clear, that there can be no doubt upon it. I was surprised at

(*d*) 2 Atk. 446.
(*e*) 1 P. W. 729.
(*f*) Cas. t. Talbot, 54.
(*g*) Amb. 171.
(*h*) 2 P. W. 542.
(*i*) 1 Cox, 318.
(*k*) *Robinson* v. *Tonge*, *supra*.

the case, when it was stated. Suppose there was no freehold estate, but there was a copyhold estate; which the owner had subjected to a mortgage; and died. It is clear, the mortgagee, having two funds, might, if he pleased, resort to the copyhold estate. But would this Court compel him to resort to it? If so, the Court marshals by the necessary consequence of its act. If the Court would not compel him, is it not clear that it is purely matter of his will, whether the simple contract creditors shall be paid, or not? That, at least, contradicts all the authorities, that if a party has two funds (not applying now to assets particularly), a person having an interest in one only has a right in equity to compel the former to resort to the other; if that is necessary for the satisfaction of both. I never understood, that if A has two mortgages, and B has one, the right of B to throw A upon the security, which B cannot touch, depends upon the circumstance whether it is a freehold or a copyhold mortgage. It does not depend upon assets only: a species of marshalling being applied in other cases, though technically we do not apply that term except to assets. So, where in bankruptcy the Crown, by extent, laying hold of all the property, even against creditors, the Crown has been confined to such property as would leave the securities of incumbrancers effectual (*l*). So, in the case of the surety (*m*), it is not by force of the contract; but that equity, upon which it is considered against conscience that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the Court, placing the surety exactly in the situation of the creditor. So, a surety may have the benefit of a mortgage of a copyhold estate exactly as of freehold. It is very difficult to reconcile this with the principle of all those cases between living persons.

So, also, in a case which this Court calls a just distribution of the effects of a deceased person, a simple contract creditor has no manner of hold upon the freehold estate. How, then, is he allowed in this Court effectually to apply it for his satisfaction? Not upon the ground that it is assets, either by will, or by contract *inter vivos*; but upon the ground, that the specialty or

(*l*) And see *Sagitary* v. *Hyde*, 1 Vern. 455.
(*m*) See *Dering* v. *Winchelsea*, *post*, Vol. II.

mortgage creditor, having two funds, shall not, by his will, resort to that, by going to which he will disappoint as just a creditor, who cannot resort to any other. *The principle in some degree is, that it shall not depend upon the will of one creditor to disappoint another.* Then, what is the distinction as to the copyhold estate? The question is, whether the debtor has not subjected the copyhold estate to the extent of the mortgage imposed upon it; whether he has not decided that his property, to that extent, shall be liable to some debt? And the Court will extract this farther principle, *that a creditor who can make it liable to that extent, shall not, by his will, defeat another; the former having two funds, the latter only one.* The principle is farther demonstrated by the cases of contracts by specialty that do not affect the real estate; as a bond, not mentioning heirs: there, according to Lord Hardwicke, there is no marshalling, as there are not two funds, and therefore no one is disappointed by the option of another; the act of the creditor's will necessarily originating out of the security he has. *Robinson* v. *Tonge*, to a certain degree, relieves simple contract creditors. The estate is charged expressly with the payment of that debt: and therefore, if the freehold and copyhold estates go to different heirs, that charge is the foundation for this Court's applying the principle of contribution; not because it is assets, but because it is charged, not being assets. The effect of that, as to simple contract creditors is that resort may be given to them upon the unexhausted part of the freehold estate, as the specialty creditors are, to a certain degree, thrown upon the copyhold.

Dec. 10.

Lord Chancellor Eldon.—I have looked into every book, and can find nothing material upon this point either in print or manuscript. No book notices that there was any such point in *Robinson* v. *Tonge*; but it is clear, from the Registrar's book, by the arrangement of the decree, that the point must have occurred. The specialty creditors insisted that they had a right to have the whole copyhold estate applied to the mortgage, in order to leave the freehold estate as assets for debts. Upon that

case, if that decision had not been made, I should have thought they would have had that right. I cannot conceive the principle upon which that decision stands. Mr. Cox had it from a book of Lord Redesdale's, a note-book of Sir Thomas Sewell, who, I have no doubt, took the note himself, and preserved it as a special case. No case, therefore, can be entitled to more respect. The difficulty is this:—Suppose the personal estate to be £1,500 and simple contract debts to that value, and a mortgage of that amount upon freehold and copyhold estates; the mortgagee, if he pleases, may call for payment out of the estate pledged. It is clear, *if no third persons are concerned* (*n*), the Court would arrange between the two estates, if they went to different persons. In that case, *if no third persons were concerned*, and the estates were of equal value, that sum would be divided between them, and the simple contract creditors would receive the whole personal estate. If the mortgagee chose to exhaust the whole personal estate, the consequence, if that doctrine is right, is, that the simple contract creditors would stand in his place against the freehold estate at least, for the proportion of the mortgage that estate ought to bear. Why? That is not the act of the testator, nor of the law. There is no more a lien for them upon the freehold estate than upon the copyhold. But the Court has said, and the principle is repeated very distinctly in *The Attorney-General* v. *Tyndall* (*o*), that if a creditor has two funds the interest of the debtor shall not be regarded, but the creditor having two funds, shall take to that which, paying him, will leave another fund for another creditor. If that is so as to simple contract creditors, having no connection with the freehold estate, except that principle of equity, why is not the same principle to apply to copyhold estate? Copyhold estate is not charged by law with debts; neither is freehold estate charged by law with simple contract debts (*p*): but this copyhold estate is

(*n*) As to third parties being concerned, see *Averall* v. *Wade*, L. & G. t. Sugden, 252; *Barnes* v. *Racster*; 1 Y. & C. C. C. 401; *Tighe* v. *Dolphin*, [1906] 1 Ir. R. 305.

(*o*) Amb. 614.

(*p*) This rule of law was altered by 3 & 4 Will. 4, c. 104, which made freeholds and copyholds liable to all debts; and see now the Administration of Estates Act, 1925 (15 Geo. 5, c. 23), s. 32.

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expressly charged with a debt: and if freehold estate is applied to simple contract debts, because charged with another debt, why is not copyhold estate?

April 26, 1803.

Lord Chancellor Eldon.—This instrument, as far as it respects the copyhold estate, is certainly an inaccurate security: for the mortgagor, covenanting to procure himself to be admitted and to surrender, and in the meantime to stand seised to the use of the mortgagee, not being himself admitted, could not with propriety be said in the meantime to stand seised, as, after admission, in a sense, he might. The effect of the deed is an agreement in equity, pledging the copyhold estate for the payment of that sum together with the freehold estate; and I state it in these terms, as I do not understand it to be an instrument of mortgage of the freehold estate, with no more than a covenant that, if the freehold estate should be deficient, the copyhold should be a security in aid; but I look upon it as giving the mortgagee a legal estate in the freehold and an equitable estate in the copyhold; thereby giving him recourse to two funds for the payment of his debt.

The question is, whether, for the sake, if it is necessary, of discharging the debts, and particularly the simple contract debts of the mortgagor, the Court will go farther than it appears to have done in a case which I found, I confess very much to my surprise, in Mr. Cox's note. I never had heard of it before. I do not find, either in print or manuscript, that it has found its way to the notice of the public, except through the channel from which Mr. Cox derived his information. There is no other note of it. Yet there is no doubt of the authenticity of that note; for Mr. Cox has, in this, as in all other cases (which makes his work of so much value in the library of a lawyer), examined the Registrar's book, which corresponds with the note. At the same time, no notice is taken of that case, or any other of that date, in Lord Hardwicke's notes. In fact, however, the records of the Court prove that there was such a

case. I understand, by the note, that there being no fund but the freehold and copyhold estates, and the mortgage creditor having both those estates in his mortgage, it was desired that equity, in order to satisfy the specialty creditors, would require him to take his satisfaction out of the copyhold estate alone. The principle stated by the Court, in answer, that copyhold estates are not liable, either in law or equity, to the testator's debts, farther than he subjected them thereto, is undeniably true. But the question is, how it is to be applied, when the testator has, by contract, subjected his copyhold estate to the whole of the debt; though at the same time subjecting an estate of another species also to the whole debt. I understand the opinion of the Court to have been, considering it a due application of the principle stated by Mr. Cox, that none of the rules subject any fund to a claim to which it was not before subject; but they only take care that the election of one claimant shall not prejudice the claims of others; that there were a freehold and copyhold estate both liable to the whole mortgage by the contract and act of the testator in his life; that though the specialty creditors could not be wholly paid, unless the mortgage was thrown upon the copyhold estate, to the intent that the freehold might be open to the specialty creditors, yet the copyhold should only bear its proportion; that is, that a value should be set upon each estate; and if that distribution of the two funds left any specialty creditor unpaid, they must abide by the loss. It is quite clear this case is by no means a due application of that principle stated by Mr. Cox. *Both the copyhold and the freehold estates were before subject to the claim;* and the converse of that proposition seems in some degree to follow from making the election of the mortgagee determine how far the specialty creditors shall or shall not be paid.

I have had an opportunity of communicating with Lord Redesdale upon this case, and have his Lordship's authority to say, that he can reconcile it with no principle; that it was as great a surprise upon him as it was upon me; and he considers it as a case standing altogether by itself, and not reconcilable to the principles which govern the Court in a great

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variety of other instances. I have also the full concurrence of Lord Redesdale's opinion, that he would not determine according to that authority. In the consideration of this subject, the word "assets" has been very frequently used. But when you come to look at the case of *marshalling*, though the term so frequently occurs, *the operation is upon the principle, that the party has a double fund.* It is said copyhold estate is not assets. Clearly it is not assets for specialty debts, not even for the debts of the Crown. But is freehold estate assets for simple contract debts? It is not, either in law nor equity (*q*). Upon what ground, then, does the Court say, in given cases, simple contract debts shall be paid out of the real estate? Not upon the ground of assets; but upon this, that, not every creditor has a pledge of land, but a specialty creditor has a double fund to resort to. There may be a mortgage, for instance, where the instrument in none of its parts or obligations would affect the heir. Though he has a pledge of the land, it is not as assets, or as a specialty creditor. But if he has a bond or covenant in the deed, he is a specialty creditor, whose demand after the death of the mortgagor would affect the heir. In that case, then, the Court says, as that specialty creditor, by his specialty contract, can affect the land, he has two funds: the freehold and the personal estate: and he shall not by his election disappoint the natural and moral equity of the creditor by simple contract to be paid out of the single fund, which his debt affects. The simple contract creditor, therefore, has no more in law any claim against the freehold estate than the specialty creditor in *Robinson* v. *Tonge* had upon the copyhold estate. But, in the former case, the Court has said, the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor; and how can a due application of that principle be made, if it is not applied where the specialty creditor has a claim against the freehold estate, but not against copyhold estate as any creditor of any sort, but both estates being

(*q*) Both freehold and copyhold estates have been assets for payment of simple contract and other debts since 3 & 4 Will. 4, c. 104; and see now 15 Geo. 5, c. 23, s. 32.

pledged and made a double fund by the act and deed and contract of the mortgagor?

Suppose another case: two estates mortgaged to A, and one of them mortgaged to B. He has no claim under the deed upon the other estate. It may be so constructed that he could not affect that estate after the death of the mortgagor. But it is the ordinary case to say, a person having two funds shall not, by his election, disappoint the party having only one fund; and equity, to satisfy both, will throw him, who has two funds, upon that which can be affected by him only, to the intent that the only fund to which the other has access, may remain clear to him. This has been carried to a great extent in bankruptcy; for a mortgagee, whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief: that he was held entitled to stand in the place of the Crown as to those securities, which he could not affect per directum, because the Crown affected those in pledge to him (*r*). Another case may be put: that a man died, having no fund but a freehold and a copyhold estate; that they were both comprehended in a mortgage to A, and the freehold estate only was mortgaged to B; and that B was not only a mortgagee of the freehold estate, but also a specialty creditor by a covenant or a bond. In that case, as well as in this, it might be said the mortgagee of both estates might, if he thought proper, apply to the freehold estate, and exhaust the whole value of it. The other would then stand as a naked specialty creditor, the fund being taken out of his reach; and there is no doubt that, being both a specialty creditor and a mortgagee of the freehold estate, but not having any claim as mortgagee upon the copyhold estate, the same arrangement would take place, that he in equity should throw the prior incumbrancer upon the estate to which the other has no resort (*s*).

The cases with respect to creditors and other classes of claimants go exactly the same length. In the cases of legatees against assets descended, a legatee has not so strong a claim

(*r*) And see *Sagitary* v. *Hyde*, 1 Vern. 455.
(*s*) See *Gwynne* v. *Edwards*, 2 Russ. 289 (n.).

to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors, having a right to go to the real estate descended, will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. That in some measure is upon the doctrine of assets; but with relation to the fact of a double fund. Both are in law liable to the creditors, and therefore by making the option to go against the one, they shall not disappoint another person, who the testator intended should be satisfied. That is not so strong as where it is not bounty, but the party has, by his own act in his life, made liable to the whole debt a copyhold estate, not in law liable, and who, having also a freehold estate, must be understood to mean, that the freehold estate shall be liable according to law to his specialty debts.

The case is exactly the same with reference to the distinction taken, that where lands are specifically devised, the legatees shall not stand in the place of the creditors against the devisees, for that is upon the supposition that there is in the will as strong an inclination of the testator in favour of a specific devisee as a pecuniary legatee, and therefore there shall be no marshalling. But if, though specifically devised, the land is made subject to all debts, that distinguishes the case; for there is a double fund; and as, by that denotation of intention, the creditor has a double fund,—the land devised, and the personal estate,—he shall not disappoint the legatee (*t*). The case is also the same, where, instead of the case of a mere specialty creditor, the land specifically devised is subject to a mortgage by the testator; as in *Lutkins* v. *Leigh* (*u*): there he shall not disappoint the legatee. So the case of *paraphernalia* is very strong for this proposition, that, wherever there is a double fund, though this Court will not restrain the party, yet he shall not so operate his payment as to disappoint another claim, whether arising by the law or by the act of the testator.

The conclusion is, that the case of *Robinson* v. *Tonge* is not reconcilable with the general classes of cases; and therefore, it

(*t*) See *Paterson* v. *Scott*, 1 De G. M. & G. 531.
(*u*) Cas. t. Talbot, 54.

is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate; if he takes it out of the freehold, those who are thereby disappointed must stand in his place as to the copyhold estate.

NOTES.

1. Generally.
2. Marshalling in Administration of Assets, p. 42.
3. Marshalling Securities, p. 46.

1. Generally.

Where one claimant A. has the right to satisfy his claim out of two funds X and Y, and another claimant B. has, subject to the prior right of A., the right to satisfy his claim out of the X fund only, it is obvious that A. by exercising his legal right and proceeding in the first instance against the X fund may either totally or partially defeat B.'s claim. Where certain conditions are fulfilled, however, equity will intervene so that an exercise of A.'s legal right shall not disappoint B.'s claim (*x*). The principle of marshalling "in some degree is that it shall not depend upon the will of one creditor to disappoint another," *per* Lord Eldon in the principal case, *supra*.

In applying the principle the Court does not affect the legal right of the creditor. The principle has never been applied to affect the interest of the creditor or to diminish his rights; it is applied only against the owners of the property charged (*y*). The principle is carried into effect by giving the claimant who has been or may be disappointed by the action of the other claimant the right to satisfy his claim out of the fund against which he had originally no right (*z*).

The doctrine of marshalling has been applied in a great variety of cases—in the administration of assets both as between creditors prior to the statutory changes hereafter noted and as between beneficiaries—in the working out of equities subsisting between

(*x*) Story, Eq. (3rd ed.), s. 550 *et seq.*; *Lanoy* v. *Athol*, 2 Atk. 444; *Re Cornwall*, 3 Dr. & War. 173; *Att.-Gen.* v. *Tyndall*, Amb. 614; *Hanby* v. *Roberts*, Amb. 127; *Ex p. Kendall*, 17 V. 514; *Tombs* v. *Roch*, 2 Coll. Ch. R. 499; *Tidd* v. *Lister*, 10 Ha. 157.

(*y*) *Mason* v. *Bogg*, 2 My. & Cr. 443; *Dolphin* v. *Aylward*, L. R. 4 H. L. C. 486, at pp. 500—501; *Douglas* v. *Cooksey*, Ir. R. 2 Eq. 311; *The Chioggia*, [1898] P. 1; but cf. *Webb* v. *Smith*, 30 Ch. D. 202—203.

(*z*) *Ex p. Kendall*, 17 V. 520.

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successive incumbrancers and in adjusting the rights and liabilities arising from the relation of principal and surety, principal and agent, etc.

The following conditions must be fulfilled in order that the doctrine may be applied :—

(1) The two claimants must be creditors of the same person, claiming against the same estate, or having demands against funds the property of the same person, or forming part of the same estate. "It was never said," observed Lord Eldon, "that if I have a demand against A. and B., a creditor of B. shall compel me to go against A. without more; as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all the obligations arising out of these complicated relations may be satisfied; but if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded on some equity giving B. the right, for his own sake, to compel me to seek payment from A." (*a*).

(2) There must be two funds already in existence before the question of marshalling is raised (*b*), and the prior creditor or claimant must have equal rights against each fund (*c*). "It is in effect no more than this, that where one person has a clear right to resort to two funds, and another person has a right to resort to one only of two funds, the latter may say that as between himself and the double creditor, that double creditor shall be first to exhaust the security upon which the single creditor (if I may so call him) has no claim" (*d*).

(3) The doctrine will not be applied to the prejudice of third parties. It is enforceable against the debtor and volunteers claiming under him (*e*).

(4) The doctrine will be applied in favour of volunteers (*f*).

A case for marshalling need not be made by the pleadings (*g*).

(*a*) *Ex p. Kendall*, 17 V. 520; *Beane* v. *Cox*, 6 B. 84.

(*b*) *Re Professional L. A. Co.*, L. R. 3 Eq. 668; *Re State F. I. Co.*, 1 De G. J. & S. 634; *Re International L. A. Soc.*, 2 Ch. D. 476.

(*c*) *Webb* v. *Smith*, 30 Ch. D. 192.

(*d*) *Per* Lord Westbury, *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 505.

(*e*) *Douglas* v. *Cooksey*, Ir. R. 2 Eq. 311; *Flint* v. *Howard*, [1893] 2 Ch. 54; *The Arab*, 5 Jur. (N.S.) 417, *The Chioggia*, [1898] P. 1, and cf. *Webb* v. *Smith*, 30 Ch. D. 192.

(*f*) *Lomas* v. *Wright*, 2 My. & K. 769; *Hales* v. *Cox*, 32 B. 118; *Mallott* v. *Wilson*, [1903] 2 Ch. 494.

(*g*) *Gibbs* v. *Ougier*, 12 Ves. 416; 8 R. R. 348, and see section 40 of the Jud. Act, 1925, replacing Jud. Act, 1873, s. 24, sub-s. 4.

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2. Marshalling in Administration of Assets.

Between Creditors.—The Act of 3 & 4 Will. 4, c. 104, which made freeholds and copyholds liable to simple contract debts, and the Act 32 & 33 Vict. c. 46, which placed the simple contract debt of persons dying on or after January 1, 1870, on an equal footing with their specialty debt, made the doctrine of marshalling inapplicable as between creditors (*gg*). The rule acted upon was that as creditors by simple contract had no claim upon real assets, unless charged with, or devised for, the payment of debts, a Court of equity would compel *specialty creditors* who could resort, in the first instance, to the personal estate, in priority of *simple* contract creditors, and to the real assets, in exclusion of them, to recover satisfaction, in the first place out of the real assets as far as they went; or, if the specialty creditors had already exhausted the personal assets in payment of their claims, the *simple contract creditors* would be put to stand in their place against the real assets, whether devised or descended, as far as the specialty creditors might have exhausted the personal assets (*h*). And a specialty creditor, to whose debt copyholds, previous to 3 & 4 Will. 4, c. 104, were not liable, might stand in the place of a mortgagee of the copyholds who was paid out of the personal estate (*i*).

Prior to the Judicature Act, 1875, the principle upon which the Courts act in cases of marshalling was departed from in the case of a mortgagee, in the administration of the assets of a deceased mortgagor in Chancery. In *Mason* v. *Bogg* (*k*), it was held by Lord Cottenham that in an administration suit a mortgagee might prove his whole debt and afterwards realise his security for the deficiency, and the same rule was followed in the winding-up of a company under the Companies Act, 1862.

This has, however, been changed by statute both in the administration of the estate of a deceased person whose estate is insolvent, and the winding-up of companies, and now the rule of bankruptcy is applied (*l*).

(*gg*) These statutes are now replaced by the A. E. Act, 1925. See above, pp. 25—28.

(*h*) *Sagitary* v. *Hyde*, 1 Vern. 455; *Galton* v. *Hancock*, 2 Atk. 436; *Tombs* v. *Roch*, 2 Coll. Ch. R. 499; *Lomas* v. *Wright*, 2 My. & K. 769.

(*i*) *Gwynne* v. *Edwards*, 2 Russ. 289 (n.). (*k*) 2 My. & Cr. 448.

(*l*) See the Judicature Act, 1875, s. 10, repealed and replaced by the Administration of Estates Act, 1925, s. 34; the Companies (Consolidation) Act, 1908, s. 207; *Re Whitaker*, [1904] 1 Ch. 299.

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Between Legatees.—Where a testator has charged one or more legacies upon the real estate, and other legacies are not so charged; if the personal estate prove insufficient to pay them all, the *legacies charged* on *the real estate* should be paid thereout; or if they have been paid out of the personal estate, the other legacies, to that extent, stand in their place as a charge upon the land (*m*).

But where the charge of a legacy upon real estate fails to take effect, the assets will not be thus marshalled (*n*). Where a legacy is given payable at a future time, *e.g.*, when the legatee attains twenty-one, *prima facie* the legacy vests at the testator's death; but if it is charged on land, the charge fails if the legatee dies before the date of payment (*o*). In such a case, the assets will not be marshalled in favour of the legatee; to do so would be to "charge the real estate indirectly" (*p*).

Where the legal order of the assets has been deranged.—If a creditor resorts to the assets for payment out of the order prescribed by law (see p. 27, *supra*), his election is not allowed to prejudice the beneficiaries (*q*).

The doctrine of marshalling in favour of legatees against heirs is part of the *lex loci*, and does not apply when the lands are situated in Scotland (*r*).

"If one *devises* real estate, and gives general pecuniary legacies *not charged* on that real estate, and the creditors exhaust the personal estate, the legatees shall not stand in their place and come on the realty, because it was the intention of the testator that the devisee should have the real estate, as well as the legatees be paid" (*s*). But otherwise if the debts *are charged* upon the real estate (*t*).

A specific legatee was not allowed to stand in the place of

(*m*) *Hanby* v. *Roberts*, Amb. 127; *Masters* v. *M.*, 1 P. W. 422; *Bligh* v. *Darnley*, 2 P. W. 620; *Bonner* v. *B.*, 13 V. 379; *Hanby* v. *Fisher*, 2 Coll. Ch. R. 515; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203; *Scales* v. *Collins*, 9 Ha. 656; *Sellon* v. *Watts*, 9 W. R. 847; Seton (7th ed.), 1603.

(*n*) *Prowse* v. *Abingdon*, 1 Atk. 482.

(*o*) *Parker* v. *Hodgson*, 1 Dr. & Sm. 568.

(*p*) *Pearce* v. *Loman*, 3 Ves. 135; *Prowse* v. *Abingdon*, 1 Atk. 482.

(*q*) *Hanby* v. *Roberts*, Amb. 128; and see *Culpepper* v. *Ashton*, 2 Ch. Ca. 117; *Tipping* v. *T.*, 1 P. W. 730; *Lutkins* v. *Leigh*, Cas. t. Talbot, 54.

(*r*) *Harrison* v. *H.*, L. R. 8 Ch. 342, 348.

(*s*) *Hanby* v. *Roberts*, Amb. 128; *Scott* v. *S.*, Amb. 383; *Mirehouse* v. *Scaife*, 2 My. & C. 695; *Keeling* v. *Brown*, 5 V. 359; *Tomkins* v. *Colthurst*, 1 Ch. D. 620; *Dugdale* v. *Dugdale*, 14 Eq. 234.

(*t*) *Surtees* v. *Parkin*, 19 B. 406; *Rickard* v. *Barrett*, 2 K. & J. 289; *Re Salt*, [1895] 2 Ch. 203; *Re Roberts*, [1902] 2 Ch. 834; *Re Stokes*, 67 L. T. 223; *Re Kempster*, [1906] 1 Ch. 446.

specialty creditors as against real estate devised (*u*). A general devisee and a specific legatee had to contribute *pro rata* to satisfy the debts of the testator which his general personal estate was insufficient to pay (*x*); but since the Administration of Estates Act, 1925, the specific legatees stand on an equal footing with the specific devisees (*y*). Where a testatrix devised her real estate and bequeathed her residuary personal estate to A, one of the executors of her will, and by a memorandum not attested as a will imposed a trust as to a specified portion of the residue in favour of third persons, it was held that for purposes of administration the portion held in trust must be treated as a specific legacy (*z*).

Before the Wills Act, a pecuniary legatee was not entitled to stand in the place of a creditor who had exhausted the personal assets as against a residuary devisee, upon the ground that every residuary devise was in reality specific, as it only comprehended property of which the testator was seised at the time of making his will (*a*). A residuary devise of real estate remains specific, notwithstanding section 24 of the Wills Act; and a pecuniary legatee had consequently (prior to the Administration of Estates Act, 1925) no right to marshal assets as against residuary devisees where the land was *not* charged with debts (*b*), or with legacies (*c*). But it is otherwise under the Administration of Estates Act, 1925 (*d*).

Where a mortgagee either of a devised, or of a descended estate, has exhausted the personal assets by resorting to them in the first instance, a legatee, whether specific or pecuniary, may stand in his place, and be satisfied out of the mortgaged premises, to the extent of the personalty applied in their exoneration (*e*).

Lands devised in trust to pay debts being applicable before

(*u*) *Haslewood* v. *Pope*, 3 P. W. 324, 5th Resolution.

(*x*) *Tombs* v. *Roch*, 2 Coll. Ch. R. 490; *Re Saunders-Davies*, 34 Ch. D. 482; *Re Bawden*, [1894] 1 Ch. 693; *Re Butler*, [1894] 3 Ch. 250.

(*y*) See 15 Geo. 5, c. 23, s. 34, and First Schedule, Part II.

(*z*) *Re Maddock*, [1902] 2 Ch. 220.

(*a*) *Spong* v. *S.*, 1 Y. & J. 300, 311; *Mirehouse* v. *Scaife*, 2 My. & C. 695.

(*b*) *Pearmain* v. *Twiss*, 2 Gif. 130; *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Gibbins* v. *Eyden*, 7 Eq. 371; *Collins* v. *Lewis*, 8 Eq. 708; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136.

(*c*) *Greville* v. *Browne*, 7 H. L. C. 689; *Raikes* v. *Boulton*, 29 B. 41; cf. *Re Saunders-Davies*, 34 Ch. D. 482; *Re Bawden*, [1894] 1 Ch. 693.

(*d*) See the First Schedule, Part II. of that Act.

(*e*) *Lutkins* v. *Leigh*, Cas. t. Talbot, 53; *Middleton* v. *M.*, 15 B. 450; *Wythe* v. *Henniker*, 2 My. & K. 635, 644; *Johnson* v. *Child*, 4 Ha. 87; *Re Smith*, [1899] 1 Ch. 365; *Re Fry*, [1912] 2 Ch. 86.

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pecuniary or specific legacies (*f*) will be marshalled in favour of legatees or annuitants (*g*); and lands devised *charged* with debts are also marshalled in favour of legacies (*h*).

Widow's paraphernalia.—Marshalling was allowed in favour of a widow's right to her paraphernalia. As was pointed out by Farwell, L.J. (*i*), the right to paraphernalia "was given by the common law to a widow; it was not a right of the husband at all, but was a limitation of the legal rights of his executors or administrators after his death. At common law all the wife's personal chattels were the property of the husband. . . . The idea of her asserting any right to paraphernalia against her husband during his life is out of the question, and any claim by him of his wife's personal chattels as paraphernalia is equally out of the question; such chattels were his own property, and if he claimed them he claimed them as such. But, in mitigation of this severity, the common law gave to the widow a right to keep certain personal chattels, of which she had had the use during coverture, after her husband's death" (*k*). The paraphernalia were in fact articles of apparel or ornament given by the husband to the wife to be worn by her, the husband retaining the ownership to the extent of being able to dispose of them during his lifetime, but having no power to bequeath them by will. The paraphernalia (except necessary wearing apparel) were liable to the deceased husband's debts; but the widow was entitled to marshal assets in all cases in which a general legatee would be entitled so to do, and it seems that she also had the right to marshal against specific legatees and devisees (*l*).

Although it is possible by special agreement for a husband to make a qualified gift to his wife of articles upon terms corresponding to those which applied at common law to the paraphernalia, nevertheless, the legal doctrine of paraphernalia, being a limitation of the husband's common law rights in his wife's chattels—rights

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(*f*) Pp. 25 and 27, *supra*.

(*g*) *Bradford* v. *Foley*, 3 Bro. Ch. 351 (n.); *Webster* v. *Alsop*, 3 Bro. Ch. 352 (n.); *Norman* v. *Morrell*, 4 V. 769; *Surtees* v. *Parkin*, 19 B. 406; *Hanby* v. *Fisher*, 2 Coll. Ch. R. 515; *Buckley* v. *B.*, 19 L. R. Ir. 544; *Paterson* v. *Scott*, 1 De G. M. & G. 531; Seton (1912), p. 1607.

(*h*) *Rickard* v. *Barrett*, 3 K. & J. 289; *Re Stokes*, 67 L. T. 223; *Re Salt*, [1895] 2 Ch. 203.

(*i*) [1909] 2 K. B., at p. 836.

(*k*) *Masson, Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831.

(*l*) *Tombs* v. *Roch*, 2 Coll. Ch. R. 490; *Gervis* v. *G.*, 14 Si. 654; *Graham* v. *Londonderry*, 2 Atk. 78; 3 Atk. 395, 369, but see *Burton* v. *Pierpoint*, 2 P. W. 79.

abolished by the Married Women's Property Act, 1882—would seem, as stated by Farwell, L.J., in *Masson, Templier & Co.* v. *De Fries* (*ll*) to "no longer have any existence."

Charity.—Until the passing of the Mortmain and Charitable Uses Act, 1891, by which property of any kind may be given to charity by will, the general rule was that assets were never marshalled in favour of legacies given to charities. The ground stated by Lord Hardwicke, in *Mogg* v. *Hodges* (*m*) was that the Courts were not warranted in setting up a rule of equity merely to support a bequest which was contrary to law. But although the Courts would not marshal for charitable legacies, a testator might in effect himself marshal his assets, by directing his charitable legacies to be paid exclusively out of his pure personalty, and the Courts would, as it was not illegal, give effect to his intention (*n*).

By the Act of 1891 it is provided (section 5) that land assured by will for a charitable purpose shall be sold within one year from the testator's death; and (by section 7) personal estate directed by will to be laid out in land is not to be so laid out, but is to go to the charity as if there had been no such direction. It is provided, moreover, by section 3 that the expression "land" in the Mortmain and Charitable Uses Act, 1888, and in the Act of 1891, is to include tenements and hereditaments of any tenure, "*but not money secured on land or other personal estate arising from or connected with land.*" It follows, therefore, that not only is a gift of land by will to a charity good, but all the law relating to the invalidity of gifts of "impure personalty" to a charity has ceased to be operative. The Act applies to the will of any testator whose death occurs after the passing of the Act (August 5, 1891). The rule of equity, therefore, that assets will not be marshalled in favour of a charity has ceased to have importance; and it is no longer necessary for a testator in his will to insert a direction for marshalling in favour of the charitable gifts therein contained.

3. Marshalling Securities.

Mortgages.—If a person who has two real estates, mortgages both to one person, and afterwards only one estate to a second mortgagee, with or without notice of the first, then the Court, as

(*ll*) *Supra.*

(*m*) 2 Ves. Sen. 53.

(*n*) *Robinson* v. *Geldard*, 3 Mac. & G. 735; *Nickisson* v. *Cockill*, 3 De G. J. & S. 622; *Miles* v. *Harrison*, L. R. 9 Ch. 316; *Re Arnold*, 37 Ch. D. 637.

against the mortgagor, his representatives and volunteers claiming through him, throws the burden of the first mortgagee's mortgage primarily on the estate which is not in mortgage to the second mortgagee, even though the estates descended to two different persons; see the judgment of Hardwicke, C., in *Lanoy* v. *Athol* (*o*).

"The right of a subsequent mortgagee of one of the estates mortgaged to marshal, that is to throw the prior charge which exists on both estates, upon that which is not mortgaged to him—is an equity which is not enforced against *third parties*, that is against any one except the mortgagor and his legal representatives claiming as volunteers under him. It is not enforced against a mortgagee or purchaser of the other estate. If both estates are subject to separate second mortgages the Court, in working out the equities of successive incumbrancers, apportions the first mortgage between them": *per* Kay, L.J., in *Flint* v. *Howard* (*p*).

Thus the Court will not (apart from an agreement creating a special equity) (*q*) marshal in favour of a second against a third mortgagee. In other words, if Blackacre and Whiteacre are mortgaged first to A, and then Blackacre to B, and then both to C, there will be no marshalling between B and C, but A will be paid rateably out of both, so that B may be paid out of Blackacre, leaving what remains of both for C. In *Barnes* v. *Racster* (*r*), R being seised of Foxhall Coppice, and a piece of land marked in a plan of the estate No. 32, mortgaged, in 1792, Foxhall to B; in 1795, Foxhall to H; in 1800, Foxhall and No. 32 to B, and in 1804, Foxhall and No. 32 to W; the subsequent incumbrancers took with notice. It was held, by Knight-Bruce, V.-C., that the Court ought not, as against W, to marshal the securities. His Honour said, that, circumstanced as the case was, H and W stood, with regard to the matter in dispute, on an equal footing; that B ought to be paid out of the respective proceeds of No. 32, and Foxhall, *pari passu* and rateably, according to their amounts; that the residue of the proceeds of Foxhall ought to be applied towards paying H, and that the residue of the produce of No. 32 ought to be applied towards paying W. In

(*o*) 2 Atk. 446; *Tidd* v. *Lister*, 3 De G. M. & G. 857, 872; *Gibson* v. *Seagrim*, 20 B. 614.

(*p*) [1893] 2 Ch. 54, at p. 73.

(*q*) See *infra*, *Re Mower's Trusts*; *Aldridge* v. *Forbes*, 4 Jur. 20.

(*r*) 1 Y. & C. C. C. 401; see *Lord St. Leonards*, V. & P. 747 (14th ed.), and see *Baglioni* v. *Cavali*, 83 L. T. 500.

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Bugden v. *Bignold* (*s*), C, second mortgagee of X, claimed, on the ground that he had no notice of the first mortgage of X and Y to A, to throw the whole of it upon Y mortgaged to B. It was held that although he had no notice he could not do this, but because he had no notice B could not insist on a similar right against him, and A's mortgage was apportioned rateably.

In *Flint* v. *Howard* (*t*), P in 1876, mortgaged a paper mill, and a reversion to H to secure £6,000. In 1882 he mortgaged the same properties to F to secure £5,000. In 1884 he mortgaged the paper mill only to F to secure £2,500. In 1885, by a deed between F, P and H the mortgage to F on the paper mill for £2,500 was transferred to H, and the paper mill was released from the mortgage of £5,000 to F. Therefore, in 1885, H was first and second mortgagee of the paper mill, and first mortgagee of the reversion, and F was second mortgagee of the reversion. P made subsequent mortgages of both properties. F foreclosed all mortgages on the reversion subsequent to his own, and then brought an action claiming to redeem H's mortgage on payment of £6,000 (*u*), an absolute transfer of the reversion, and a transfer of the mortgage on the paper mill. Held that the £6,000 must be apportioned between the paper mill and the reversion according to their respective values, and that F was entitled to a conveyance of the reversion absolutely, and of the paper mill as a security for such part of the £6,000 as should be apportioned to that property. H., therefore, as second mortgagee of the paper mill, would have a right to redeem F on payment of the sum so apportioned (*x*). *Sed qu.?* as to the rights *inter se* of F and H if F had not foreclosed so as to become entitled to the reversion, subject to H's £6,000, but had redeemed H's mortgage. Could he tack the £5,000 to the £6,000 and insist on being paid both sums by H if he, as second mortgagee of the paper mills sought in turn to redeem F? (*y*) and *quære* as to whether the equitable right to

(*s*) 2 Y. & C. C. C. 377; and see *Gibson* v. *Seagrim*, 20 B. 614; *Moxon* v. *Berkeley Bldg. Socy.*, 59 L. J. Ch. 524.

(*t*) [1893] 2 Ch. 54.

(*u*) See *Mutual L. S.* v. *Langley*, 32 Ch. D. 460.

(*x*) See further *Stronge* v. *Hawkes*, 4 De G. & J. 632; *Averall* v. *Wade*, L. & G. t. Sugden, 252; *Baldwin* v. *Belcher*, 3 Dr. & War. 176; *Hughes* v. *Williams*, 3 Mac. & G. 690; *Baldwin* v. *Belcher*, 3 Dr. & War. 173; *Re Fox*, 5 Ir. Ch. R. 541; *Re Lawder's Estate*, 11 Ir. Ch. R. 346; *Re Rorke's Estate*, 15 Ir. Ch. R. 316; *Dolphin* v. *Aylward*, L. R. 4 H. L. 486; *Trumper* v. *T.*, L. R. 8 Ch. 870.

(*y*) See *per* Lindley, L.J., [1893] 2 Ch., at p. 68, and cf. *Tetley* v. *Davies*, 15 Vin. Abr. 447, fol. 20, and 2 Y. & C. C. C. 399 (n.). As to the right to tack since the new legislation, see *infra*, vol. ii, notes to *Marsh* v. *Lee*.

apportionment is affected by notice or absence of notice of the first mortgage (*z*).

Commenting on the *dictum* of Kay, L.J., in this case as to the immateriality of notice, a learned author (*a*) observes—"If B's right to exoneration is to be treated as an active equity, then it is submitted that the question whether C has notice of that equity is material. . . . If, however, the right to marshal is not an active equity at all, but originates in the working out of two simultaneous rights of redemption, then the question of notice ceases to be material." The same author expresses the view that there is no such thing as an independent equity to marshal, but that what is called marshalling, in the cases referred to, is "merely the result of working out successive rights of redemption."

If a third mortgagee, by his mortgage, takes expressly, *subject to and after payment of the first two mortgages*, the second mortgagee will be entitled to marshal as against the third. Thus, in *Re Mower's T.* (*b*), a mortgagor being entitled in reversion to funds A and B, made three mortgages. The first mortgage included A and B, the second mortgage included B only, and the third mortgage included A and B, but was made *subject to, and after payment of the two former mortgages*. Fund A was absorbed in payment of the first mortgage. It was held by Romilly, M.R., that the second mortgagee was entitled to marshal as against the third by standing in the place of the first mortgagee as against fund B (*c*).

The doctrine of marshalling will not be applied to the *prejudice of volunteers* where one of the estates has been conveyed away by a voluntary settlement (*d*). But estates comprised in one mortgage will be marshalled as against the mortgagor in favour of a voluntary settlement, so as to throw the debt on the unsettled estates. Thus, in *Hales* v. *Cox* (*e*), A B executed a voluntary settlement of real estate to uses in favour of his four children, and *covenanted* that the estate should remain to those uses and for quiet enjoyment. A B afterwards mortgaged the settled estate with his own unsettled

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(*z*) See *per* Kay, L.J., [1893] 2 Ch., at p. 73.

(*a*) Ashburner on Principles of Equity, pp. 289—290.

(*b*) *Re Mower's Trusts*, 8 Eq. 110.

(*c*) See also *Re Roddy*, 11 Ir. Ch. R. 369.

(*d*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 502; *Re Townley, the Public Trustee* v. *Allder*, [1922] 1 Ch. 154.

(*e*) 32 B. 118; *Mallot* v. *Wilson*, [1903] 2 Ch. 494; and see *Anstey* v. *Newman*, 39 L. J. Ch. 769, cf. *Averall* v. *Wade*, *infra*, p. 53.

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estates, and died. It was held by Romilly, M.R., that the children were entitled to throw the mortgages on the unsettled estate, and as against the legatees to prove under the covenants against the settlor's assets for the damage they had sustained by the mortgage. "It is clear," said his Honour, "that the persons who take under the voluntary settlement would, as regards the subsequent mortgages, not only take the property subject to those mortgages, but the mortgages ought, by marshalling, to be thrown as much as possible on the unsettled property, so as to liberate the settled property from the mortgage. If, by these means, the settled property will not be altogether freed from the mortgages, then I think that the persons who are entitled to the benefit of the covenants for quiet enjoyment contained in the settlement have a right to prove against the assets of the settlor for the amount to which they have been damaged by reason of his subsequently mortgaging the settled property; that is, after providing for the testator's debts, they are entitled to priority over the legatees" (*f*).

In *Re Darby's Estate* (*g*), an assignor, having deposited with his bank the title deeds of certain leasehold property and a policy, as security for whatever sum might for the time being be owing to the bank, subsequently made a voluntary assignment of the leaseholds to his wife, the deed containing no reference to the charge to the bank and no covenants for title, express or implied. By his will the assignor gave all his property to trustees in trust for his wife and children. His executors paid off the debt to the bank. Held that the charge being one created by the debtor himself, and not a charge paramount to his own title, the widow, as assignee of the leaseholds, was under no liability to contribute. In *Re Best* (*h*), an assignor mortgaged two policies on his life to an insurance company to secure £125, and entered into a personal covenant for payment. He subsequently made a voluntary assignment of the policies to his wife, the deed containing no reference to the mortgage. On the assignor's death the insurance company paid to the widow the policy money, after deducting the amount due under the mortgage. It was held that the widow was entitled to be reimbursed, out of the assignor's general estate, the amount thus deducted by the insurance company.

(*f*) See Seton (1912), p. 2018, and the remarks on this case by Christian, L.J., in *Ker* v. *K.*, 4 Ir. Eq. 15; and see this case discussed in *Re Darby*, [1907] 2 Ch. 465, and cf. *Re Repington*, [1904] 1 Ch. 811, and *Re Best*, [1924] 1 Ch. 42.

(*g*) [1907] 2 Ch. 465.

(*h*) [1924] 1 Ch. 42.

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Marshalling in favour of a second incumbrancer whose charge is voluntary, as against a third incumbrancer, was given where the third incumbrancer expressly agreed that his incumbrance should not affect the rights of those claiming under the second (*i*).

Where the owner of two estates charged with debts, mortgages one of them, and recites in the mortgage deed by mistake, *that the debts are paid*, and covenants against incumbrances, he will be bound to indemnify the mortgaged estate out of the other estate; in other words, there will be marshalling against the mortgagor and volunteers claiming through him (*k*). And the result has been the same when a mortgagor settling *part* of mortgaged estates covenants to exonerate them from incumbrances; the tenant in tail under the settlement has been held entitled under these circumstances to throw the mortgage upon the unsettled estates, not only as against the settlor and against the assignee in bankruptcy, but also as against subsequent judgment creditors (*l*), but not, it seems, against a subsequent incumbrancer being an assignee for value without notice (*m*).

Where, however, two estates both charged with debts and legacies under a will are successively mortgaged under a power of appointment contained in the will, the former incumbrancer, though his mortgage contains a covenant against incumbrances, cannot marshal against the latter incumbrancer any more than he could have done against persons taking in default of appointment (*n*).

Nor will the doctrine of marshalling be applied in favour of a subsequent mortgagee as against intermediate volunteers, in favour of whom one of the estates subject to a mortgage has been conveyed. Suppose, for instance, A mortgaged Blackacre and Whiteacre to B, and then made a voluntary settlement of Whiteacre, and afterwards mortgaged Blackacre to C, the doctrine of marshalling would not be applied in favour of C, by compelling B to have recourse to Whiteacre alone so as to leave Blackacre free (*o*).

If one of two estates in mortgage is subject to a *portion*, the

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(*i*) *Aldridge* v. *Forbes*, 4 Jur. 20; *Lysaght's Estate*, [1903] 1 Ir. R. 235, and cf. *Re Mower's Trusts supra.*

(*k*) *Stronge* v. *Hawkes*, 4 De G. & J. 632, 651.

(*l*) *Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 De G. M. & G. 393.

(*m*) *Barnes* v. *Racster; Stronge* v. *Hawkes*, *supra*, but see *Tighe* v. *Dolphin*, [1906] 1 Ir. R. 505, following *Averall* v. *Wade*, *infra*, p. 53.

(*n*) *Stronge* v. *Hawkes*, *supra.*

(*o*) *Dolphin* v. *Aylward*, L. R. 4 H. L. 486, 501.

person entitled to the portion may, if it be necessary, compel the mortgagee to resort to the other estate, so that the payment of the portion as well as the mortgage may be worked out (*p*).

So where a jointure is a charge upon two estates, and a portion upon one of them only, the portioner can compel the jointress to resort to the other estate. In *Lanoy* v. *Athol* (*q*), Lanoy created, by marriage settlement, a charge of £500 a year upon real estate as a jointure for his wife, afterwards Duchess of Athol, and there was a covenant for the payment thereof. Under a post-nuptial settlement by Lanoy of his real estate, there was a term of 200 years created to raise a portion of £6,000 for daughters. The plaintiff, being an only daughter, was entitled to £6,000, which the real estate was sufficient to pay. It was held that the Duchess of Athol having two funds, *viz.*, the real estate under the settlement and copyholds and personal estate to which she could have recourse under the covenant, for the payment of her jointure, while the plaintiff had only one fund, *viz.*, the real estate in settlement, she was entitled to turn the Duchess upon the copyhold and personal estates (*r*).

Where an estate is subject to debts, legacies, or other charges, and the owner mortgages a part of such estate, the mortgagee is entitled, not only as against the mortgagor (*s*), or a purchaser from him of the part mortgaged, but also as against his subsequent execution creditors (*t*), and even (it seems) as against a purchaser of the whole estate (*u*), to throw such charges upon that part of the estate which is not comprised within his security.

In applying the doctrine of marshalling to mortgagees and creditors, the Court will not interfere with the first mortgagee's right to take his debt out of that part of his security which becomes first available upon the ground that other funds are comprised in his security (*x*), nor will a mortgagee who is executor and legatee of the mortgagor be compelled to satisfy the mortgage debt out of the first sufficient sum of personal assets that comes to his

(*p*) *Rancliffe* v. *Parkyns*, 6 Dow, 216; cf. *Re Saunders-Davies*, 34 Ch. D. 482.
(*q*) 2 Atk. 444.
(*r*) See also *Legh* v. *L.*, 15 Si. 135.
(*s*) *Haynes* v. *Finch*, 17 Jur. 930; *Re Loder's Trusts*, 56 L. J. Ch. 230.
(*t*) *Gray* v. *Stone*, 69 L. T. 282.
(*u*) *Finch* v. *Shaw*, 18 Jur. 935; affd. *sub nom. Collyer* v. *Finch*, 5 H. L. C. 905; *Haynes* v. *Forshaw*, 11 Ha. 93. The cases in this note are criticised in Halsbury, Vol. XXI, p. 305, note (i).
(*x*) *Wallis* v. *Woodyear*, 2 Jur. (N.S.) 179.

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hands (*y*); but if the mortgagee having a *double fund* has exercised his option in such a way as to disappoint a creditor by taking the only fund to which he could resort (*z*), or even if such only fund had been applied for convenience by the order of the Court (*a*), such exercise of option or order will not have the effect of disappointing the creditor with one fund only, who will therefore be entitled to stand *pro tanto* in the place of the former (*b*).

The doctrine of marshalling, however, is not applicable where no question can be raised as to the insufficiency of the single fund. Thus a second mortgagee having the security of estates A and B and offering to redeem a prior mortgagee having the security of estate A only, cannot be compelled by the prior mortgagee to resort to estate B in the first instance (*c*).

"In this case," said Lord St. Leonards (*d*), "the second mortgagee, who has the security of the two estates, offers to pay to the prior mortgagee every shilling due on his security. This case, therefore, has nothing to do with the principle of *Aldrich* v. *Cooper*." The reason why the first mortgagee in this case wished the doctrine of marshalling to be applied was because he had obtained (subject to the second mortgage) a lease of the same estate as that of which he was first mortgagee.

Judgment Debts.—Where there are judgments affecting estates, and some of the estates are settled for valuable consideration, and there has been either a mere concealment of the judgment, and, *a fortiori*, if there is a declaration or covenant in the settlement that the estate is free from incumbrances, the trustees entitled to the settled estates will be entitled to the benefit of the doctrine of marshalling, by having the judgments thrown upon the unsettled estates, not only as against the settlor himself but also as against the judgment creditors of the settlor subsequent to the settlement, who do not stand in any better position than the settlor himself. In *Averall* v. *Wade* (*e*) a person being seised of several estates,

(*y*) *Binns* v. *Nichols*, 2 Eq. 256.

(*z*) *Aldrich* v. *Cooper*, at p. 39, *supra*; cf. *Lysaght's Estate*, [1903] 1 Ir. R. 235.

(*a*) *Gwynne* v. *Edwards*, 2 Russ. 289 (n).

(*b*) *Trimmer* v. *Bayne*, 9 V. 209.

(*c*) *Gregg* v. *Arrott*, L. & G. t. Sugden, 246.

(*d*) L. & G. t. Sugden, at p. 250.

(*e*) (1835), L. & G. t. Sugden, 252; see *Re Jones*, [1893] 2 Ch. 470; *M'Carthy* v. *M'Cartie*, [1904] 1 Ir. R. 100, and see *Stronge* v. *Hawkes*, *supra*; see *A.* v. *W.* discussed in *Ker* v. *Ker* (1869), Ir. R. 4 Eq. 15; *Lysaght's Estate*, *supra*; *Flint* v. *Howard*, *supra*, p. 48.

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and indebted by judgments, settled one of the estates for valuable consideration, with a covenant against incumbrances. He subsequently acknowledged other judgments, and it was contended, by such subsequent judgment creditors, that, as their judgment debts only affected the unsettled estates, they, on the principle in *Aldrich* v. *Cooper*, having only one fund, had a right to compel the prior judgment creditors, who had two funds,—the settled and unsettled estates,—to resort to the settled estates; or, at any rate, that the settled estates ought to contribute to the payment of the prior judgments. Sugden, C., however, held that the subsequent judgment creditors had no equity to compel the prior judgment creditors to resort to the settled estates: on the contrary, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute (*f*).

Bankruptcy.—A trustee in bankruptcy takes the bankrupt's estate subject to all equities and therefore subject to the equity to marshal (*g*). So where A taking under a will two estates charged with legacies, mortgaged each estate separately, the proceeds of one estate proving insufficient to pay the legacies and mortgage money, the mortgagee of that estate was held entitled as against the mortgagor or his assignees in bankruptcy, to call upon the legatees to take so much of their legacies out of the other mortgaged estate, which was amply sufficient to answer for the legacies and the mortgage thereon, as would leave a sufficiency to pay his mortgage (*h*).

Insurance Policies.—An insurance office, where a policy is forfeitable on the suicide of the assured except as to a beneficial interest vested in an assignee, cannot upon the suicide of the assured, compel the assignee to resort to other securities held by him for the debt, or to have it rateably paid out of all the securities (*i*). The result is the same when the policy has been assigned with other

(*f*) See also *Going* v. *Farrell*, Beat. 472; *Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 De G. M. & G. 393; *Re Lynch's Estate*, 1 Ir. Eq. 396.

(*g*) *Per* Lord Erskine, in *Ex p. Hartley*, 1 Deac., at p. 294; *Baldwin* v. *Belcher*, 3 Dr. & W. 173; cf. *Dolphin* v. *Aylward*, L. R. 4 H. L. 486.

(*h*) *Ex p. Hartley*, 1 Deac. 288; explained in *M'Carthy* v. *M'Cartie*, [1904] 1 Ir., at pp. 109—111; *Broadbent* v. *Barlow*, 3 De G. F. & J. 570; *Ex p. Alston*, L. R. 4 Ch. 168; *Heyman* v. *Dubois*, 13 Eq. 158; *Ex p. Salting*, 25 Ch. D. 148.

(*i*) *Solicitors, etc., L. A. Soc.* v. *Lamb* (1864), 2 De G. J. & S. 251; *City Bank* v. *Sovereign L. A. Co.* (1884), 50 L. T. 565.

securities to the company, for upon the death of the assured by suicide, the company must repay themselves their debt out of the sum assured, and re-assign the securities to the parties entitled to them (*k*).

Surety.—Where the creditor has two funds to which he can resort, the surety is entitled to marshal not only as against the principal debtor but also as against all persons claiming under him. In *Re Westzinthus* (*l*), W. shipped oil to L. & Co., who, on its arrival, endorsed the bill of lading and deposited it with H. & Co., brokers, who advanced money on it. H. & Co. had previously advanced money upon other goods the property of L. & Co. deposited with them by way of security. L. & Co. having become bankrupt, the oil not having been paid for, the agents of W. claimed the oil from the master, who, however, delivered it to H. & Co. It was held first that the transfer of the goods to H. & Co. would in equity be treated as a pledge or mortgage only, and that W., therefore, by his attempted stoppage *in transitu*, acquired a right to such goods in equity against the assignees of L. & Co., subject to the lien of H. & Co., for the sum they had advanced upon them. Secondly, that W., by means of his goods, had become surety to H. & Co. for L. & Co.'s debt, and had a clear equity to oblige H. & Co. to pay their debt out of L. & Co.'s own goods deposited with them in ease of his surety, and, all the goods of W. and L. & Co. having been sold, W. might insist on the proceeds of L. & Co.'s goods being appropriated to the payment of the debt, and therefore that W. was entitled to have all the proceeds of the oil paid over to him (*m*). A surety, moreover, can compel the principal creditor, a mortgagee, to avail himself of his equitable right to consolidate securities, so that marshalling may be carried out in favour of the surety (*n*). In *Heyman* v. *Dubois* (*nn*), A, by policy 9322, assured his life for £2,000—which he mortgaged to the office for £1,000. A subsequently effected a policy 9695 for £1,000 in the same office, and then mortgaged it to the office to secure £500. A afterwards effected a policy 10,688 for £1,000 in the same office, and mortgaged this policy together with policy 9322 to the office to secure

(*k*) *White* v. *British Empire, etc., L. A. Co.* (1868), 7 Eq. 394.

(*l*) 5 B. & Ad. 817.

(*m*) Approved *Kemp* v. *Falk*, 7 A. C. 573. See also *Spalding* v. *Ruding*, 6 B. 376; *Ex p. Alston*, L. R. 4 Ch. 168; and see De Colyar (1897), p. 321.

(*n*) The right to consolidate securities has been much curtailed; see notes to *Marsh* v. *Lee*, *infra*. (*nn*) 13 Eq. 158.

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£1,500, for the repayment of which the plaintiff was security. A became bankrupt, and the plaintiff being sued by the company, paid them £975 16s. 10d. in part discharge of the judgment and costs. Policy 10,688 was forfeited for non-payment of the premium. Upon A's death it was held by Bacon, V.-C., that as against A's assignee in bankruptcy the plaintiff was entitled to have the securities marshalled, so as to be paid out of the policy moneys the sum which he had been compelled to pay under the judgment, including the costs of the action (*o*).

The right, however, of a subsequent mortgagee B of one fund to compel a former mortgagee A of the same fund and another to resort, in the first instance, to that fund which will leave his own either wholly or partially free, cannot be interfered with by a *surety* for the debt due on the first mortgage who on the exhaustion of the fund not mortgaged to B has paid the balance of the debt due to A and has taken an assignment of A's security on the other fund (*p*).

Agents.—If an agent, as for instance a factor or consignee, pledge the goods of his principal and also goods of his own to secure a debt, the pledgee may be compelled by the principal to resort first to the agent's goods. In *Ex p. Alston* (*q*), a firm in Ceylon employed a firm in England as their agents and factors, and the course of the business was that the Ceylon firm consigned cargoes of coffee to the English firm for sale on their account, and drew bills on the English firm against the consignments. Consignments of coffee having been made in this manner, and bills accepted by the English firm against them, the English firm pledged the coffee which belonged to the Ceylon firm, together with certain securities of their own, with T., their broker, to secure a large debt due from them to him. The English firm became insolvent, and executed a creditors' deed under the Bankruptcy Act, 1861; and then T. sold the coffee, which produced more than sufficient to cover the bills drawn against it, and enough of the other securities to satisfy his debt, and still held securities of the English firm in his hands. It was held by the Court of Appeal in Chancery that the Ceylon firm were entitled, as against the creditors of the English firm, to have the securities marshalled, so as to have a lien on the securities of

(*o*) Seton (1912), at p. 2017.

(*p*) *South* v. *Bloxam*, 2 Hem. & M. 457; explained in *Dixon* v. *Steel*, [1901] 2 Ch. 602.

(*q*) L. R. 4 Ch. 168.

the English firm remaining in the hands of T., for the balance due to them in respect of the consignments of coffee. A guarantee by one partner for the debt of the firm, which gives the creditor a right of proof against the separate estate of the partner in addition to his right of proof against the joint estate of the partnership, is also a security to which the principle of marshalling is applicable (*r*).

Husband and Wife.—Married Woman.—Where husband and wife mortgaged all the estates of the wife, and subsequently one of the estates to another person, the latter was held entitled to marshal against the wife surviving (*s*).

In *Re Loder* (*t*), C., a widow, was entitled to one-third of the income of a fund restrained from anticipation, and to the other two-thirds free from restraint. She mortgaged all her interest in the fund to F. She then married, and charged her interest in favour of P. The income was sufficient to pay the interest on F.'s mortgage, and also the premiums of certain policies which formed part of his security. It was held that as between F. and P., F. should take his interest and the premiums first out of the one-third restrained, so as to leave the remaining two-thirds free for P.

Landlord and Mortgagee.—The principle of marshalling has been applied to cases between a landlord and a mortgagee of chattels of a tenant, where the landlord has distrained not only the chattels comprised in the security, but also other chattels of the tenant. Thus, in *Ex p. Stephenson* (*u*), a tenant mortgaged some personal chattels, and being in possession of them and also of other personal chattels, the landlord distrained for rent upon both sets of chattels. The person in possession under the distress was requested by the mortgagee, and consented, to hold possession of the goods, or at least of the mortgaged goods, for him as well as the landlord, without prejudice to the landlord's rights. The tenant then became bankrupt, and after the bankruptcy the landlord's demand was satisfied by means of a sale of goods, some, if not all, of which were subjected to the mortgagee's security, whilst some or all of the goods to which the security did not extend remained unsold.

(*r*) *Ex p. Salting* 25 Ch. D. 148; *Ex p. Alston*, L. R. 4 Ch. 168; *Re Westzinthus*, 5 B. & A. 817; *Broadbent* v. *Barlow*, 3 De G. F. & J. 570.

(*s*) *Tidd* v. *Lister*, 3 De G. M. & G. 857.

(*t*) 35 W. R. 58; and see Lush (1910), at p. 272.

(*u*) De G. 586.

Aldrich v. Cooper.

It was held by Knight-Bruce, V.-C., that the mortgagee was entitled to stand in the place of the landlord, and to be paid the amount of his mortgage debt out of the proceeds of the goods taken under the distress which were not comprised in his security.

Portions.—A testator devised his real estate subject to a trust to raise portions. His general personal estate was insufficient for the payment of debts, and the real estate and the specifically bequeathed personal estate had to contribute rateably. Held that, as between the portioners and the persons entitled to the real estate, the former were not bound to contribute (*x*).

Two Funds, one subject to Lien.—The defendants, S. & Co., auctioneers, sold a brewery for X, and had in hand the sale-money, subject to their charges. They also sold for X some furniture, and held the proceeds. X assigned the proceeds of the brewery to the plaintiff W, who gave notice to S. & Co. S. & Co. paid X the proceeds of the furniture money, and paid themselves out of the brewery money assigned to W. Held by C. A. that, as S. & Co. had not equal claims or charges upon both funds, but a lien only on the brewery money, and a mere right of set-off as to the furniture money, they were right in so satisfying their lien, and that the principle of marshalling had no application (*y*).

The Crown.—Marshalling takes place where the Crown has two funds to which it can resort under an extent, *viz.*, an estate comprised within a mortgage—and other property of the mortgagor; "for" in such a case, as observed by Eldon, L.C., in the principal case, "a mortgagee whose interest in the estate was affected by an extent of the Crown, has found his way, even in a question with the general creditors, to this relief, that he was held entitled to stand in the place of the Crown, as to those securities which he could not affect *per directum*, because the Crown affected those in pledge to him" (*z*). So when creditors were not entitled to be paid out of real estate, "there being a debt owing to the king, it was ordered that the king's debt should be satisfied out of the real estate, that the other creditors might be let in to have satisfaction of their debts out of the personal assets" (*a*).

(*x*) *Re Saunders-Davies*, 34 Ch. D. 482. Cf. *Re Bawden*, [1894] 1 Ch. 692.
(*y*) *Webb* v. *Smith*, 30 Ch. D. 192; and cf. *Re Dunlop*, 21 Ch. D. 583.
(*z*) *Supra*, p. 38.
(*a*) *Sagitary* v. *Hyde*, 1 Vern. 455.

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Admiralty Cases.—The same doctrine was applied in the Admiralty Court, as for instance where there were several bonds, and one was secured on the ship and freight, and another upon the ship, freight, and *cargo*, the bond-holders who had a charge on the cargo were not allowed to disappoint the other bond-holders who had none thereon, but were compelled to resort to the security against their ship and freight (*b*). So where bottomry bond-holders had two funds out of which they might be satisfied, the first being ship and freight, and the second the cargo, and the master could only resort to the first fund for payment of his claim for wages and disbursements, the funds would be marshalled by the Court so as to allow the master to be paid out of the proceeds of the ship and freight (*c*). And since the Judicature Act the equity is to be recognised and acted upon by every Division of the High Court of Justice (*d*).

(*b*) *The Trident*, 1 Wm. Rob. 29, 35; *La Constancia*, 2 Wm. Rob. 404, 406; *The Arab*, 5 Jur. (N.S.) 417.

(*c*) *The Edward Oliver*, L. R. 1 Ad. & Ecc. 379; *The Chioggia*, [1898] P. 1; and see *The Eugenie*, L. R. 4 Ad. & Ecc. 123; *The Priscilla*, Lush. 1.

(*d*) Judicature Act, 1925, ss. 36—44, replacing section 24, sub-sections 1 to 4, and section 25, sub-section 11 of the Judicature Act, 1873.

HOWE *v.* EARL OF DARTMOUTH.
HOWE *v.* COUNTESS OF AYLESBURY.

May 22, 1802. 7 V. 137, 6 R. R. 96.

Conversion as between Tenant for Life and Remainderman.

General rule, that where personal property is bequeathed for life, with remainders over, and not specifically, it is to be converted into the Three per Cents., subject, in the case of a real security to an inquiry, whether it will be for the benefit of all parties; and the tenant for life is entitled only upon that principle.

Bequest of personal estate not held specific merely from being combined with a devise of land.

The Court will protect an executor in doing what it would order.

William Earl of Strafford, by his will, dated October 25, 1774, gave to his wife Anne, Countess of Strafford, *all his personal estate whatsoever* (except the furniture of Wentworth Castle) for *her life*, subject to the following outpayments and legacies. He also left to her all his houses, gardens, parks, and woods, and all his landed estates for her life; and afterwards all his personal and landed estates to his eldest sister Lady Anne Conolly for her life: and then to the eldest son of George Byng, Esq.; and afterwards to his second, third, or any later sons he may have by the testator's niece Mrs. Byng; and then to the eldest son and other sons successively of the Earl of Buckingham by his niece Caroline, but all of them to be subject to the following outpayments and legacies. He left his wife the sum of £15,000 to dispose of for ever as she pleases, and the value of £500 in furniture in Wentworth Castle of whatever sort she chooses, else the whole furniture to be hers if she meets with any difficulty in this disposition. He gave several legacies and annuities, and declared he would have all his debts paid, and gave all his servants a year's wages.

The testator died on March 10, 1791. Anne Countess of Strafford died in his life, on February 9, 1785. Lady Anne Conolly filed a Bill for an account of the personal estate, etc.

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By a decree made at the Rolls on May 17, 1793, the usual accounts were directed; and it was declared that the plaintiff would be entitled to the interest of the clear residue of the testator's personal estate during her life; and an inquiry was directed, who were the next-of-kin of the testator at the time of his death.

The Master's report, dated March 7, 1796, stated the account of the personal estate, part of which consisted of the following stocks and annuities, standing in the testator's name at his death:—

£4,320 Bank Stock;

£9,572 per annum Long Annuities;

£750 per annum Short Annuities.

Under orders made in the cause, the sum of £15,000 and £4,000 had been paid in by the executors, and laid out in £3 per Cent. Consolidated Bank Annuities.

By a decretal order, made on May 7, 1796, the balance of the personal estate in the hands of the executors, and of the interest, etc., was ordered to be paid into the Bank; and that the executors should transfer the £4,320 Bank Stock, the £9,572 per annum Long Annuities, and £750 per annum Short Annuities, to the Accountant-General, in trust in the cause; and that the said funds, when so transferred, should be sold with his privity; and that the money to arise by such sale should be laid out in the purchase of £3 per Cent. Annuities, in trust in the cause, subject to a further order; and that the Master should appropriate a sufficient part of the said Bank Annuities, when purchased, to answer the growing payments of the several annuities; and that, as any of the annuitants should die, the funds appropriated respectively should fall into the general residue, with liberty to apply; and it was ordered, that the interest of the residue of the said Bank Annuities after such appropriation, and also the interest and dividends of the said £4,320 Bank Stock, should be paid to the plaintiff Lady Anne Conolly for her life, and on her death any person or persons entitled thereto were to be at liberty to apply: and after providing for the costs out of the balance of the personal estate, and for the arrears of the annuities out of the sum of

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£2,067 6s. 1d., the balance of the interest and dividends received by the executors and ordered to be paid into the Bank, it was ordered that the remainder should be paid to Lady Anne Conolly; and also that £1,846 9s. 7d., cash in the Bank, which had arisen from interest of the funds in which part of the testator's personal estate had been invested, should be also paid to her; and that the dividends of £24,619 4s. 10d., £3 per Cent. Bank Annuities, in which the sums received by the executors from the personal estate had been invested, should from time to time be paid to her during her life, and on her death any persons claiming to be entitled were to be at liberty to apply; and it was ordered, that the executors should get in the outstanding personal estate, and that so much thereof as should consist of interest should be paid to Lady Anne Conolly, and so much as consisted of principal, should be paid into the Bank, subject to further order.

The Master's further report, dated December 10, 1796, stated that the Bank Stock and the Long and Short Annuities had been sold, and the produce laid out in £3 per Cent. Annuities.

Upon the death of the plaintiff Lady Anne Conolly, the suit was revived by her executors; and the cause coming on before Lord Alvanley, then Master of the Rolls, for further directions on the subsequent report, it was insisted, on the part of Mr. Byng, that Lady Anne Conolly had received, for interest and dividends accrued on the Bank Stock and the Long and Short Annuities, and the produce thereof laid out in Bank £3 per Cent. Annuities, large sums more than she was entitled to, if those funds had been sold, as they ought to have been immediately after the testator's decease, and the produce invested in a permanent fund, viz., the £3 per Cent. Consolidated Bank Annuities. The Master of the Rolls directed inquiries with reference to that question between the executors of Lady Anne Conolly and Mr. Byng, and the other parties interested in the residue of the personal estate; with liberty to present a petition to re-hear the order of 1796, as to the payments thereby directed to be made to Lady Anne Conolly.

The re-hearing was argued before Lord Rosslyn, but no judgment was given.

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Mr. Mansfield, Mr. Lloyd, Mr. W. Agar, Mr. Wingfield, Mr. Serjeant Palmer, Mr. Bell, and Mr. Richards, for different parties, in support of the petition of re-hearing.

The tenant for life of such funds as Bank Annuities, carrying a higher interest, and Long and Short Annuities, wearing out rapidly, are not entitled to the enjoyment of them *in specie*; but there is a standing rule of the Court, for the benefit of all parties interested, that those funds shall be laid out in the more equal fund, the £3 per Cents. No party ought to suffer by the circumstance, that what ought to have been done, and what the Court would have directed to be done, immediately on the testator's death, was not done. The state of this question is, that the late Lord Chancellor went out of office without having delivered any opinion upon the point; and Lord Alvanley thought he could not decide against the order of the Lord Chancellor; supposing his Lordship to have been of opinion, that there was something particular in this will, upon the distinction between the gift of a general residue for life, with remainder over, and a specific bequest of this sort of property; in which case it could not be sold, and the dividends follow, of course, from the death of the testator; even the rule, that takes place in general legacies postponing the payment of interest to the end of a year from the death, not attaching upon it. But there is nothing specific in this will. This is a mere gift of the residue of the personal estate for life, subject to the payment of debts, legacies, and annuities. Under every such will, the Court has always sold this sort of property, if there was any wearing out fund, not specifically given, or any fund as to which the tenant for life had an advantage over those in remainder * * * *

Mr. Romilly, and Mr. Trower, for the executors of Lady Anne Conolly, in support of the decree.

The first question is, whether Lady Anne Conolly was entitled to the annual produce of the personal estate at the death of the testator; if not, the next consideration is, whether the executors having paid it to her, and particularly the dividends of the Bank Stock, those payments ought to be called back.

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The personal estate is given to her for life specifically. As this disposition is expressed, it is the same as if the testator had enumerated the particular articles, of which the personal estate consisted. He has not given his personal estate to his executors, in trust to sell, etc., and that what remains shall be given to those persons: but he has given the personal estate to them specifically as he has given the land. The Lord Chancellor considered, that there was nothing in the will, which made it necessary for the executor to convert this property into any other fund. For many purposes a bequest of all the personal estate is considered specific; for instance, upon the question of exoneration, where there is a charge of debts. There is no doubt of the general rule: but this question does not depend upon it * * * *

The second question is of considerable novelty, as to what is to be done with the dividends received, particularly upon the Bank Stock. With reference to the Bank Stock, as distinguished from the Annuities, no case has established that the executor had done wrong by paying to the tenant for life the interest of some permanent fund, though producing more than if the property was invested in the £3 per Cents.; and to make this party account for what she has received, that proposition must be made out * * * *

The Lord Chancellor [Eldon] desired the counsel in reply not to trouble himself upon the point whether the bequest was specific, and to advert to the Bank Stock.

Mr. Mansfield, in reply.—In this respect there is no difference between the Bank Stock and the Annuities. The price is perfectly accidental, and is never considered. The Court says, first, Bank Stock is the stock of a trading company, not a Government fund, secured by the Legislature. The former also produces a high dividend, and is therefore more liable to fluctuation and uncertainty. For these reasons, this Court never suffers those funds to remain which are considered hazardous, and, to a certain extent, wasteful. The tenant for life cannot have any more right to advantage in the shape of that large dividend,

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than of Long and Short Annuities. The Court goes further, ordering the conversion of £4 per Cents., a Government fund, probably on the principle that they are liable to be redeemed, and not so permanent a fund. With respect to refunding, these are trustees. Their conduct cannot affect the rights; and it happens that there are dividends now due to Lady Anne Conolly in Court, which, if the decision is against her, the executors have no objection to apply to the refunding, if it is to take place * * * *

Lord Chancellor Eldon.—No question arises upon this will except whether this is a specific bequest of such personal estate as was the testator's at the time of his death. Lord Rosslyn is represented to have had considerable doubt whether it was not specific; and if it is, I agree, not only Lady Anne Conolly, up to the date of the decree, but afterwards, and Mr. Byng and the other persons in remainder, must take the specific produce of what is specifically given. But if it is so to be considered, the decree is not correct, considering the bequest specific to the date of that decree, and no longer. It is wrong, therefore, in any way.

Upon the question, whether this is specific, it must be either upon the words describing the personal estate, or upon the construction of those words, coupled with the devise of all his landed estates.

With respect to the latter, every *devise of land*, whether in particular or general terms, must of necessity be specific, from this circumstance, that a man can devise only what he has at the time of devising. Upon that ground, in the case at the Cockpit, it was held, that a residuary devisee of land is as much a specific devisee as a particular devisee is.

But it is quite different as to *personal estate*. The question must be, *did he mean to dispose of what he had at the date of the will, or of that which he should have at his death?* If he meant the former, then every part of that identical personal estate, which is disposed of between the date of the will and the death, is a legacy adeemed: *pro tanto* it is gone. If the question is, whether those subjects, to be acquired between the

date of his will and his death, should pass, I cannot say he did mean that. If not it can only be specific thus: that the persons to take the personal estate he should have at his death in different interests should enjoy it as he left it.

Not one word of this will goes to that. It is given as "all his personal estate"; and the mode in which he says it is to be enjoyed, is to one for life, and to the others afterwards. Then, the Court says, *it is to be construed as to the perishable part, so that one shall take for life, and the others afterwards; and unless the testator directs the mode, so that it is to continue as it was, the Court understands that it shall be put in such a state, that the others may enjoy it after the decease of the first;* and the thing is quite equal: for it might consist of a vast number of particulars; for instance, a personal annuity, not to commence in enjoyment till the expiration of twenty years from the death of the testator, payable upon a contingency, perhaps. If, in this case, it is equitable that Long or Short Annuities should be sold, to give every one an equal chance, the Court acts equally in the other case; for those future interests are, for the sake of the tenant for life, to be converted into a present interest, being sold immediately in order to yield an immediate interest to the tenant for life. As *in the one case, that in which the tenant for life has too great an interest, is melted for the benefit of the rest; in the other, that, of which, if it remained in specie, he might never receive anything, is brought in, and he has immediately the interest of its present worth.*

As to the annuities charged upon this estate, the tenant for life, if entitled to the whole, would be properly paying out of the aggregate property the annuities. But it would be great injustice to those in remainder, if these capital sums were paid out of that part of the bulk of the property which does not consist of perishable interests, and were not to be thrown in proportion upon the perishable part. The ordinary rule of apportioning requires that, in some degree, a provision should be made out of those (the Short Annuities), if they remain, and not out of the £3 per Cents. only.

The cases alluded to, where personal estate has been taken

to be specifically given, do not apply. First where a residuary legatee takes it [the residue] as a specific gift, not subject to debts, the inference, that he is to take that personal estate, is not made, in general cases, upon the bequest of all the testator's personal estate, but upon the effect of that, connected with what arises out of other parts of the will, with regard to the intention to fix upon other funds charges that would primarily fall upon that fund; and that must be made out, not by conjectures, but by declaration plain, or manifest intention (*a*). That is the principle upon which it is agreed these cases are to be construed; and the intention has never been considered manifest merely from a disposition of the personal estate in the same clause with land; which must be taken to be specifically given. But those cases do not go the length, that, if the enjoyment is portioned out in life interests, with remainders over, it is specific. I am clearly of opinion, therefore, that this is not a case in which the personal estate is in this sense specifically given, with a direction that it shall remain specifically such as it was at the testator's death; and the purposes for which it is given are those for which it is admitted there is a general rule, that these perishable funds are to be converted in such a way as to produce capital bearing interest.

I was astonished when that was doubted. From general recollection, I had considered the practice to be, that the first moment the observation of the Court was drawn to the fact, the Court would not permit property to be laid out, or to remain upon such funds, under a direction to lay it out in Government securities, but would immediately order it to be converted into that which the Court deems, for the execution of trust, a Government security.

I pass over what has been said as to real securities; for there is a great difference between real securities, or Bank Stock, for instance, and Government securities. Bank Stock is as safe, I trust and believe, as any Government security; but it is not Government security; and therefore this Court does not lay out, or leave, the property in Bank Stock; and what the Court will

(*a*) See *Ancaster* v. *Mayer*, *supra*, p. 1.

decree, it expects from trustees and executors; I will not state what the Court would do, where executors had not made these conversions. That depends upon many circumstances. But I abide by Lord Kenyon's rule in the case of Mr. Champion, an executor, before which time it was doubted whether an executor could lay out the property in £3 per Cents. (*b*). Lord Kenyon, who was a repository of valuable knowledge, produced a *dictum* of Lord Northington, that the Court would protect an executor in doing what it would order him to do. The Court in this case would order him to do that.

It is not so in the case of a mortgage. The Court would not permit a real security to be called in without an inquiry, whether it would be for the benefit of every person; and it is accident that some part of the assets will produce more interest than a genuine trust security. In some instances, there is little doubt, it may be not only for the benefit of the tenant for life, but for the substantial interest of the remainderman, that the property should not be shifted from a good real security.

The question then is, whether the Court will change the fund, not as between the remainderman and the executor, but in a question between the tenant for life and the remainderman; and the question with the executor cannot well arise, so as to be acted upon, till a failure by the tenant for life, or those who represent him; for the justice of the case, if the tenant for life has received so much, would be, that he should bring it back in ease of the executor, who paid him. If the rule is that the fund shall not remain, it is impossible to say the date of the decree shall decide. I do not like to put it upon the possibility of collusion; but that is not to be totally neglected, for it may happen that the executor himself may be the tenant for life, and then he has an interest in delay. Of necessity there must be great delay before there can be a final decree in a cause of great property, and it may be very much protracted where there is an interest. However, I do not put it upon that. But if the principle is, that the Court, when its observation is thrown upon it, will order the conversion, it ought to be considered, to all practicable purposes as

(*b*) See Order 22, r. 17; and Trustee Act, 1925, s. 1.

converted, when it could be first converted. That is the genuine inference from the other principle. If the Court has ever attended to the difficulties often thrown before it, with regard to perishable property of other kinds, as leasehold estate, etc., it never has as to stock. You can learn the price at which it might be converted on any day, and the moment the Court was ordered by the Legislature to lay out its funds in stock, it necessarily held, that for this purpose stock must always be considered of the same value. It is for the benefit of the creditor that it should be thrown into a lasting fund; and it is equal to all the parties interested. As to Bank Stock, the Court has ordered £4 per Cents. and £5 per Cents. to be sold and converted into £3 per Cents. upon this ground, that, however likely, or not, that they may be redeemed, the Court looks at them as a fund that is not permanent, though it may remain for ever; and considers, that from that quality, there is an advantage to the present holder, who gets more interest, because they are liable to be redeemed. I do not know whether the reasoning is as just in practice as it is in theory. Property cannot be laid out by this Court in Bank Stock in the execution of a trust to lay it out in Government securities, for it is not a Government security. Converting that, therefore, the executors would have done what this Court would have ordered, and that falls under the same consideration, and the advantage, if any, ought not to accrue to the tenant for life. The account, therefore, must go as to that, as well as the Long and Short Annuities, *from the time at which it would have been converted, if the observation of the Court had been drawn to the fact that the executors were possessed of those funds.*

This petition of re-hearing is therefore well founded.

NOTES.

1. Generally.
2. Intention to give enjoyment *in specie*, p. 72.
3. Income of residue as between legatee for life and successors, p. 79.
4. Duties and liabilities of trustees as to conversion, p. 84.

1. Generally.

When there is a bequest of a testator's residuary estate to persons in succession, and no trust for conversion, and such estate is

not invested upon securities which would be authorised by the Court, then, unless there is an express or implied expression of intention by the testator that such estate is to be enjoyed *in specie*, the general rule of the Court is, that it is to be converted and invested in Consols or other authorised securities (*c*).

The rule only applies to a disposition by will of residuary personal estate given as one fund to be enjoyed by several persons in succession, and does not apply to a settlement by deed (*d*). Though it cannot perhaps be said that the rule in the principal case never applies in the case of an absolute gift of a residue with an executory limitation over, yet the rule is not generally applicable in such a case (*e*).

The rule is applicable to property of a wasting or perishable kind, *e.g.*, terminable annuities, leaseholds (*f*) and, in favour of the tenant for life, to reversionary property (*g*), and to all other existing investments not of the recognised character, and which are consequently deemed to be more or less hazardous (*h*). In some cases a distinction has been attempted to be drawn between "wasting" assets, and assets, which although "hazardous," are permanent in nature (*i*). But this distinction does not appear to be sound in principle. Indeed, it must be frequently more prejudicial to a reversioner that hazardous assets than wasting assets (such as long leaseholds) should be retained *in specie* (*k*).

Where personal estate is given in terms amounting to a general residuary bequest, to be enjoyed by persons in succession, the interpretation the Court, in the absence of evidence of a contrary intention, puts upon the bequest is, that the persons indicated are to enjoy in succession the same thing; and in order to effectuate that intention, the Court, as a general rule, converts into permanent

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(*c*) *Tickner* v. *Old*, 18 Eq. 422; *Thursby* v. *T.*, 19 Eq. 406; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Roberts* v. *Morgan*, 23 L. R. Ir. 118; Seton (1912), p. 1616; Jarman (1910), p. 1242.

(*d*) *Re Van Straubenzee*, [1901] 2 Ch. 779.

(*e*) *Re Bland*, [1899] 2 Ch. 336, 338, and cf. *Re Hammersley*, 81 L. T. 150.

(*f*) *Fryer* v. *Buttar*, 8 Si. 442; *Wightwick* v. *Lord*, 6 H. L. C. 217.

(*g*) *Wilkinson* v. *Duncan*, 23 B. 469; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 2 De G. J. & S. 352; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*h*) *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Prendergast* v. *P.*, 3 H. L. Cas. 218; *Wightwick* v. *Lord*, 6 H. L. Cas. 217; *Johnson* v. *Routh*, 27 L. J. Ch. 305; *Harrington* v. *Atherton*, 2 De G. J. & S. 352; *Wilkinson* v. *Duncan*, 23 B. 469; and the observations of Cottenham, C., in *Pickering* v. *P.*, 4 My. & C. 289.

(*i*) *Re Sheldon*, 39 Ch. D. 50; *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394; and cf. *Re Chaytor*, [1905] 1 Ch. 233.

(*k*) See *Re Nicholson*, [1909] 2 Ch. 111; Jarman (1910), p. 1248.

investments so much of the personalty as is not so invested, and also reversionary interests (*l*). The rule did not originally ascribe to testators the *intention* to effect such conversions, except in so far as a testator may be supposed to intend that which the law will do; but the Court, finding the intention of the testator to be, that the objects of his bounty shall take successive interests in one and the same thing, converts the property, as the only means of giving effect to that intention (*m*).

All property, of whatever kind, included in a residuary bequest, whether wasting, perishable, or even permanent in its character, if it be not invested in authorised securities, would, in the absence of any directions to invest, be converted and invested by order of the Court in $2\frac{1}{2}$ per Cent. Consols (*n*); and it will be the duty of the trustees to act in a similar manner (*o*), subject, nevertheless, to the provisions of the Trustee Act, 1925, and R. S. C., Order XXII, r. 17. Where, however, wasting securities are retained under a power to postpone conversion or where the property is so laid out as to be secure, and to produce a large annual income, but is not capable of immediate conversion without loss or damage to the estate; the rule is not to convert the property but to set a value upon it and to give the tenant for life equitable interest thereon (*p*).

For instances of the application of the rule laid down in the principal case, see the cases cited in note (*q*).

Annuities.—The rule applies in favour of one having a life annuity charged on a residue (*r*). So, likewise, if it be charged on a wasting fund, as in *Fryer* v. *Buttar* (*s*), where the testator

(*l*) *Macdonald* v. *Irvine*, *supra*; *Re Pitcairn*, [1896] 2 Ch. 199.

(*m*) *Cafe* v. *Bent*, 5 Ha. 35; but see *Pickering* v. *P.*, 4 My. & C. 289.

(*n*) Seton (1912), p. 1141; *Roberts* v. *Morgan*, 23 L. R. Ir. 118; *Thornton* v. *Ellis*, 15 B. 193.

(*o*) *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*p*) *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; *Caldecott* v. *C.*, 1 Y. & C. C. C. 312, and see *Re Llewellyn's Trust*, 29 B. 171; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; cf. *Gray* v. *Siggers*, 15 Ch. D. 74; *Re Evans*, [1921] 2 Ch. 309.

(*q*) *Lichfield* v. *Baker*, 2 B. 481; *Sutherland* v. *Cooke*, 1 Coll. Ch. R. 498; *Pickup* v. *Atkinson*, 4 Ha. 624; *Caldecott* v. *C.*, 1 Y. & C. C. C. 312; *Johnson* v. *J.*, 2 Coll. Ch. R. 441; *Benn* v. *Dixon*, 10 Si. 636; *Chambers* v. *C.*, 15 Si. 183; *Lichfield* v. *Baker*, 13 B. 447; *Oakes* v. *Strachey*, 13 Si. 414; *Hood* v. *Clapham*, 19 B. 90; *Jebb* v. *Tugwell*, 20 B. 84; 7 De G. M. & G. 663; *Blann* v. *Bell*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Howard* v. *Kay*, 27 L. J. Ch. 448; *Craig* v. *Wheeler*, 29 L. J. Ch. 374; *Re Game*, [1897] 1 Ch. 881; *Re Shaw's Trusts*, 12 Eq. 124; *Re Rowlls*, [1900] 2 Ch. 107.

(*r*) *Wightwick* v. *Lord*, 6 H. L. Cas. 217.

(*s*) 8 Si. 442.

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gave to M. W. an annuity of £40 for life payable out of his Long Annuities, and directed that at M. W.'s death the principal out of which the annuity arose should go to his next-of-kin then living; and he further directed, that the annuity should be secured on his stock of Long Annuities. The testator died possessed of £509 Long Annuities; Shadwell, V.-C., held, that a fund for payment of the annuity ought to be provided in the Three per Cents., and that the money required for that purpose ought to be raised by the sale of part of the Long Annuities, and that the remainder of the Long Annuities formed part of the testator's residuary estate.

2. Intention to give Enjoyment *in specie*.

This intention may be expressed, or may be inferred from the terms of the whole will, and the authorities show an inclination to allow small indications of intention to exclude the rule (*t*). Where the interests of successive takers of a residue are not conflicting, as where a residue is given to a widow for life for the maintenance of herself and children, and to be equally divided at her death among her children, the case for conversion is weaker than where the interests of the tenant for life and remainderman are antagonistic (*u*).

Where wasting or reversionary property is given to persons in succession *specifically*, in the strict sense of that term, then there can be no reason for converting it (*x*).

But the mere absence of a direction to convert the property has never been construed to mean that it should be enjoyed *in specie* by legatees in succession (*y*).

If, however, an intention can be collected from the will, that property shall be enjoyed *in specie*, as it existed at the death of the testator, although the property be not, in a technical sense, specifically bequeathed (*z*), where, for instance, in the gift there is a partial enumeration of articles (which does not render the

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(*t*) *Pickering* v. *P.*, 4 My. & C. 289; *Collins* v. *C.*, 2 My. & K. 703; *Morgan* v. *M.*, 14 B. 72; *Hinves* v. *H.*, 3 Ha. 611; *Re Bland*, [1899] 2 Ch. 336; *Re Pitcairn*, [1896] 2 Ch. 199. But see *Macdonald* v. *Irvine*, 8 Ch. D. 124.

(*u*) *Marshall* v. *Bremner*, 2 Sm. & G. 237.

(*x*) *Vincent* v. *Newcombe*, You. 599; *Cockran* v. *C.*, 14 Si. 248.

(*y*) *Johnson* v. *J.*, 2 Coll. Ch. R. 441; *Morgan* v. *M.*, 14 B. 72, 83.

(*z*) As to which see *Bothamley* v. *Sherson*, 20 Eq. 304; *Re Ovey*, 20 Ch. D. 676; 8 A. C. 812.

residuary gift specific (*a*)), it ought not to be converted (*b*), even although the trustees have given to them a discretionary power to do so (*c*); if such power is given to the trustees, with a view to the security of the property, and not with a view to vary or affect the relative right of the legatees (*d*). And where a residuary devise and bequest contains certain property the gift of which is specific, such as lands, freeholds, etc., there is a ground for inferring that other property included in the residue, such as Long Annuities, were also intended to be given specifically (*e*).

The argument in favour of specific enjoyment of things partially enumerated is, perhaps, weaker when they are given through the intervention of a trust (*f*).

A direction for conversion at a particular time, *e.g.*, the death of the tenant for life, will entitle the tenant for life to specific enjoyment (*g*).

So also a discretionary power of sale given to the trustees or to the tenant for life is inconsistent with and negatives any presumed intention of the testator that there should be conversion by the Court (*h*). But if the discretion is never exercised, the rule in *Howe* v. *Lord Dartmouth* applies (*i*).

A power to vary securities is important, as showing that the testator did not intend his residue to remain on perishable

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(*a*) As to which see *Sutherland* v. *Cooke*, 1 Coll. Ch. R. 498; *Mills* v. *M.*, 7 Sim. 501, 508; *Fielding* v. *Preston*, 1 De G. & J. 444.

(*b*) *Hinves* v. *H.*, 3 Ha. 611; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Pickup* v. *Atkinson*, 4 Ha. 624; *Pickering* v. *P.*, 4 My. & C. 289; *Hubbard* v. *Young*, 10 B. 203; *Harris* v. *Poyner*, 1 Dr. 181; followed in *Re Game*, [1897] 1 Ch. 881; *Collins* v. *C.*, 2 My. & K. 703.

(*c*) *Lord* v. *Godfrey*, 4 Madd. 455.

(*d*) *Milne* v. *Parker*, 12 Jur. 171; *D'Aglie* v. *Fryer*, 12 Si. 1; *Marshall* v. *Bremner*, 2 Sm. & G. 237; *Hubbard* v. *Young*, 10 B. 203; *Harris* v. *Poyner*, 1 Dr. 181; *Morgan* v. *M.*, 14 B. 72; *Mills* v. *Brown*, 21 B. 1; *Fielding* v. *Preston*, 1 De G. & J. 438; *Boys* v. *B.*, 28 B. 436; *Thursby* v. *T.*, 19 Eq. 406; *Re Pitcairn*, [1896] 2 Ch. 199.

(*e*) *Bethune* v. *Kennedy*, 1 My. & C. 114; *Simpson* v. *Earles*, 11 Jur. 921; 81 R. R. 928; *House* v. *Way*, 18 L. J. Ch. 22; 83 R. R. 345; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Holgate* v. *Jennings*, 24 B. 623; but see *Blann* v. *Bell*, 5 De G. & Sm. 658; *Re Game*, [1897] 1 Ch. 881.

(*f*) *Craig* v. *Wheeler*, 29 L. J. Ch. 374; 8 W. R. 172; followed in *Re Game*, *supra*; *Vincent* v. *Newcombe*, You. 599; *Vaughan* v. *Buck*, 1 Ph. 75; *Blann* v. *Bell*, 2 De G. M. & G. 775; *Hood* v. *Clapham*, 19 B. 90; *Boys* v. *B.*, 28 B. 436; *Thursby* v. *T.*, 19 Eq. 395.

(*g*) *Alcock* v. *Sloper*, 2 My. & K. 699; *Simpson* v. *Lester*, 33 L. T. 6; *Daniel* v. *Warren*, 2 Y. & C. C. C. 290; *Harvey* v. *H.*, 5 B. 134; *Rowe* v. *R.*, 29 B. 276.

(*h*) *Re Pitcairn*, [1896] 2 Ch. 199; *Re Bentham*, 94 L. T. 307; and see *Burton* v. *Mount*, 2 De G. & Sm. 383; *Skirving* v. *Williams*, 24 B. 275.

(*i*) *Re Rowlls*, [1900] 2 Ch. 107.

securities (*k*). But it is said by Leach, V.-C., in *Lord* v. *Godfrey* (*l*), that such power is given to trustees with a view to the security of the property, and not with a view to vary or affect the relative rights of the legatees.

And where the property is given over specifically at the death of the tenant for life (*m*), or where the conversion of a part is expressly postponed for a certain time, the tenant for life will be entitled to specific enjoyment during that period (*n*), so where there is a power to sell or renew leaseholds with his consent (*o*).

Where a tenant for life is entitled to enjoy *in specie*, the rule is that investments may remain, but mere debts—such as turnpike bonds—must be got in and the proceeds invested (*p*). But a power given in a will by a testator to trustees, after a direction to sell and convert his real and personal estate, "to continue invested any of his Government stocks and real securities," was held to be confined to such Government stocks as were of a permanent character, and therefore not to include Long Annuities (*q*).

A direction that certain property—shipping—comprised in a residuary bequest should not be converted during a certain term of years is tantamount to a direction that it should remain *in specie* during that term, and the tenant for life will be entitled to the income of it while it so remains *in specie* (*r*), or until it is sold under a discretionary power vested in trustees. Where there is a *trust* for conversion and investment with a discretionary power to postpone conversion, and a provision that the income until conversion is to be paid to the tenant for life, he will be entitled to the actual income produced till conversion, and the rule in the principal case does not apply either for or against the tenant for life. Accordingly, if the trustees in a proper exercise of their discretion retain unproductive property or do not realise reversionary interests, the tenant for life has no claim as against the

(*k*) *Morgan* v. *M.*, 14 B. 72, 85.

(*l*) 4 Madd. 459.

(*m*) *House* v. *Way*, 18 L. J. Ch. 22; *Harris* v. *Poyner*, 1 Dr. 174; *D'Aglie* v. *Fryer*, 12 Si. 1; *Collins* v. *C.*, 2 My. & K. 703.

(*n*) *Green* v. *Britten*, 1 De G. J. & S. 649; but see *Re Carter*, 41 W. R. 140; and *Re Chaytor*, [1905] 1 Ch. 233.

(*o*) *Hinves* v. *H.*, 3 Ha. 609; *Crowe* v. *Crisford*, 17 B. 507; *Hind* v. *Selby*, 22 B. 373; *Skirving* v. *Williams*, 24 B. 275.

(*p*) *Holgate* v. *Jennings*, 24 B. 623, 630; *Crowe* v. *Crisford*, 17 B. 507.

(*q*) *Tickner* v. *Old*, 18 Eq. 422; *Re Sheldon; Re Bates; Re Wilson*, *supra*. But see *Re Nicholson*, [1909] 2 Ch. 111.

(*r*) *Green* v. *Britten*, 1 De G. J. & S. 655; followed in *Re Lambert*, 36 Sol. Jo. 327; cf. *Brown* v. *Gellatly*, *infra*, p. 79.

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remaindermen (*s*). There must, however, be an actual valid exercise of their discretion by the trustees in order to exclude the rule. In *Rowlls* v. *Bebb* (*t*), the testator directed conversion, giving the trustees a discretionary power to postpone, and directed that the produce of his outstanding personal estate should be treated as annual income. The estate comprised a reversionary interest in a sum of Consols subject to the life interest therein of the tenant for life under the will, but included no wasting assets. The trustees did not convert the reversionary interest. The Court of Appeal held that the evidence showed that the whole question as to whether the reversionary interest should or should not be converted was never considered by the trustees, and that, therefore, there had been no exercise of their discretion. It also appears that in the opinion of the Court, the fact that there were no wasting assets, the retention of which might counterbalance the non-conversion of the reversionary interest, rendered that non-conversion improper (*u*).

A discretion in trustees to retain or sell any part of the trust estate will, it seems, be regarded as an expression of intention that the tenant for life should enjoy it (though wasting) *in specie* (*x*). A power to postpone the sale of a business involves a power to continue it, and the tenant for life takes the income (*y*).

A direction to discharge incumbrances on (*z*), to renew or keep in repair (*a*), or a power to demise, leaseholds (*b*), is an indication of intention that the tenant for life should enjoy *in specie*.

An exception from a general direction to convert may show an intention that the exempted property is to be enjoyed *in specie* as in *Wilday* v. *Sandys* (*c*), where a testator gave his residuary estate to trustees in trust to convert into money such parts thereof as

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(*s*) *Mackie* v. *M.*, 5 Ha. 70; *Wrey* v. *Smith*, 14 Si. 202; *Johnston* v. *Moore*, 27 L. J. Ch. 453; *Lean* v. *L.*, 23 W. R. 484; *Miller* v. *M.*, 13 Eq. 263; *Re Hubbuck*, [1896] 1 Ch. 754; cf. *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*t*) [1900] 2 Ch. 107.

(*u*) [1900] 2 Ch., p. 116, *per* Lindley, M.R., and p. 119, *per* Rigby, L.J.

(*x*) *Gray* v. *Siggers*, 15 Ch. D. 74, followed in *Re Nicholson*, [1909] 2 Ch. 111; *Simpson* v. *Lester*, 4 Jur. (N.S.) 1269; *Re Leonard*, 29 W. R. 234; *Green* v. *Britten*, 1 De G. J. & S. 649; *Re Chancellor*, 26 Ch. D. 42; *Re Sheldon*, 39 Ch. D. 51; *Re Thomas*, [1891] 3 Ch. 482; cf. *Re Chaytor*, [1905] 1 Ch. 233; *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394.

(*y*) *Re Crowther*, [1895] 2 Ch. 56, 60; *Re Elford*, [1910] 1 Ch. 814.

(*z*) *Re Sewell*, 11 Eq. 80.

(*a*) *Crowe* v. *Crisford*, 17 B. 507. See *Re Game*, *infra*.

(*b*) *Hind* v. *Selby*, 22 B. 373; *Thursby* v. *T.*, 19 Eq. 395; *Re Darnley*, [1907] 1 Ch. 159; and see *Re Oliver*, [1908] 2 Ch. 74; *Re Elford*, *supra*.

(*c*) 7 Eq. 455.

should not at his decease consist in money, or be invested in any of the public funds or Government securities, and to invest the same in such public funds or Government securities as to them should seem most advantageous, Romilly, M.R., held that the Long Annuities, of which the testator died possessed, were within the exception from the trust for conversion (*d*).

Where the residuary estate includes properties producing rents, the question has frequently arisen whether in such case a direction to the trustees to pay the rents to persons entitled for life will exclude the rule requiring the conversion of leaseholds. The question is discussed at length, and the earlier decisions reviewed by Stirling, J., in *Re Game* (*e*). In that case the residuary estate included both freeholds and leaseholds, and the testator directed his trustees to pay the rents and profits of his residuary real and personal estate to his wife for life, and after her death gave his residuary estate to certain persons in succession charged after his wife's death with certain annuities. Each annuitant was given a power of distress for the recovery of his annuity. It was held, that as the residue included both freeholds and leaseholds the mere use of the word "rents" was not an indication of intention that the property was to be enjoyed *in specie*. The word "rents" could be satisfied by applying it to the freeholds, and the powers of distress were not by necessary implication to be over the leaseholds. The result would be otherwise if there were no freeholds or if other indications of intention that the leaseholds were to be enjoyed specifically were contained in the will (*f*). In *Alcock* v. *Sloper* (*g*), where there was a general residuary bequest, upon trust to permit the testator's widow to receive the rents, profits, dividends, and proceeds thereof, for life, Leach, V.-C., held, that the word "dividends" had reference to Long Annuities, of which part of the testator's estate consisted, and that the use of the

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(*d*) *Howard* v. *Kay*, 27 L. J. Ch. 448; *Grant* v. *Mussett*, 8 W. R. 330. Cf. *Porter* v. *Baddeley*, 5 Ch. D. 542; *Preston* v. *Melville*, 15 Si. 35.

(*e*) [1897] 1 Ch. 881; *Craig* v. *Wheeler*, 29 L. J. Ch. 374, followed; *Re Wareham*, [1912] 2 Ch. 312.

(*f*) *Goodenough* v. *Tremamondo*, 2 B. 512; *Cafe* v. *Bent*, 5 Ha. 36; *Re Game*, [1897] 1 Ch. pp. 884-5; *Re Wareham*, [1912] 2 Ch. p. 316; and see *Hunt* v. *Scott*, 1 De G. & Sm. 219; *Howe* v. *H.*, 14 Jur. 359; *Burton* v. *Mount*, 2 De G. & Sm. 383; *Blann* v. *Bell*, 5 De G. & Sm. 658; 2 De G. M. & G. 775; *Harris* v. *Poyner*, 1 Dr. 174; *Hind* v. *Selby*, 22 B. 373; *Bowden* v. *B.*, 17 Si. 65; *Boys* v. *B.*, 28 B 436; *Thursby* v. *T.*, 19 Eq. 395.

(*g*) 2 My. & K. 699.

word " dividends " was equivalent to a direction that the widow should enjoy the Long Annuities *in specie*.

In *Pickup* v. *Atkinson* (*h*), where the testator died possessed of leaseholds, Long Annuities, and £3 5s. per Cent. Annuities, and ready money, it was held, that a bequest of the rents and profits, dividends, and interest of a residue, comprising that property, did not indicate an intention that it was to be enjoyed *in specie*. The same conclusion arose from the words of the gift over, namely, " the whole of such residue of my said property " (*i*).

A direction that powers of attorney should be given to *cestuis que trust* entitled to receive in succession the income of property, may show the testator's intention that they were to enjoy it *in specie* (*k*).

No implication arises that the general residue is not to be converted from the fact that there is a direction to convert certain specific parts of the personal estate (*l*). Nor do express directions that the residue of personal estate shall be sold from time to time by executors for payment of debts and legacies, raise an implication that it is to be sold for no other purpose, so as to prevent the operation of the general rule (*m*).

A direction to divide the property after the death of the tenant for life has been held to indicate an intention that the tenant for life should enjoy the property *in specie* (*n*).

Any expression from which it can be inferred that the testator intended the remainderman to take the same property as the tenant for life, will show that it was his intention that the tenant for life should enjoy the property *in specie*. Thus in *Harris* v. *Poyner* (*o*), the testator devised and bequeathed all the residue of his real and personal estate, " and all his estate *term* and interest therein " to trustees in trust for his wife for life, and after her death, he devised " *the same* and all his estate *term* and interest therein "

(*h*) 4 Ha. 625.

(*i*) And see *Booth* v. *Coulton*, 7 Jur. (N.S.) 207.

(*k*) *Neville* v. *Fortescue*, 16 Si. 333.

(*l*) *Cafe* v. *Bent*, 5 Ha. 34; *Morgan* v. *M.*, 14 B. 85, 86; *Hood* v. *Clapham*, 19 B. 90.

(*m*) *Caldecott* v. *C.*, 1 Y. & C. C. C. 312; *Sutherland* v. *Cooke*, 1 Coll. Ch. R. 498; *Johnson* v. *J.*, 2 Coll. Ch. R. 441.

(*n*) *Collins* v. *C.*, 2 My. & K. 703; *Re Barratt*, [1925] Ch. 550; and see *Bethune* v. *Kennedy*, 1 My. & C. 114; *Pickering* v. *P.*, 2 B. 31; 4 My. & C. 289; *Vaughan* v. *Buck*, 1 Ph. 75; *Oakes* v. *Strachey*, 13 Si. 414; *House* v. *Way*, 12 Jur. 958; *Holgate* v. *Jennings*, 24 B. 623; but see *Pickup* v. *Atkinson*, 4 Ha. 630, *per* Wigram, V.-C., p. 630.

(*o*) 1 Dr. 174; followed in *Re Game*, [1897] 1 Ch. 881.

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to his son. Kindersley, V.-C., held, founding his decision on the word "term," that the testator intended the son to take the identical property, and, therefore, that during the life of the widow no conversion was to take place (*p*).

In *Thursby* v. *T.* (*q*), a testator seised of real estate, and possessed of leasehold collieries which he was working, by his will devised all his real estate and also all his leasehold estates and all his goods, chattels and credits, and other personal estate to trustees for persons in succession; it was held that a *power* given to the trustees (amongst other things) in case they should deem it beneficial so to do, to continue the collieries and either to increase or abridge the business thereof, and to procure any lease of the collieries to be renewed, and to continue the business after such renewal, was a sufficient indication of intention on the part of the testator, that the tenants for life should enjoy the collieries *in specie*, especially as the tenant for life of one moiety—an unmarried daughter—had power to appoint any part not exceeding one half of the *rents*, issues and profits, interest, dividends and annual income of her moiety during the lifetime of any husband for his use.

A mere direction postponing the payment of legacies or the distribution of estate until after the death of the tenant for life, will not be a sufficient indication of intention that he is to enjoy the residue *in specie*, inasmuch as such a direction may be taken to refer, not to the management of the property or the securities in which it should be invested, but simply to the postponement as regards the time of the coming into being of the interests respectively created by the will after the death of the tenant for life (*r*). Nor will the fact that many of the bequests in the will are specific, and require that the subject-matter of them should be left *in specie* during the existence of the life estate, lead fairly to any inference that the residuary estate is also to be left *in specie* during the existence of such life estate (*s*).

A gift to the tenant for life of the income of the *testator's* "*entire* estate," will not, it seems, afford an indication of the testator's intention that his property should remain *in specie* until

(*p*) But see *Lichfield* v. *Baker*, 2 B. 481; 13 B. 447; *Thornton* v. *Ellis*, 15 B. 193; *Bowden* v. *B.*, 17 Si. 65.

(*q*) 19 Eq. 395; and see *Re Wareham*, [1912] 2 Ch. 312.

(*r*) *Macdonald* v. *Irvine*, 8 Ch. D. 101, 123; see also *Blann* v. *Bell*, 2 De G. M. & G. 775; *Re Evans*, [1921] 2 Ch. 309. Cf. *Re Barratt*, [1925] Ch. 550.

(*s*) *Macdonald* v. *Irvine*, 8 Ch. D. 101, 123, 124.

after the death of the tenant for life; at any rate, where the context shows that those words do not mean "to be kept intact," but are used in their ordinary or popular signification of "all" or "the whole" estate as distinguished from a part of the estate (*t*); but it is otherwise where the trustees are given an express power of retaining existing investments, which they exercise (*u*).

3. Income of Residue as between Legatee for Life and Successors.

In *Re Trollope's Will Trusts* (*x*) it was held by Tomlin, J., that where under the will of a testator unauthorised investments are retained under a power to postpone conversion, the rule in *Howe* v. *Lord Dartmouth* is unaffected by the provisions of the L. P. Act, 1925, and the A. E. Act, 1925.

Where a residue is bequeathed with directions to convert and invest for the benefit of persons in succession and the income before conversion is not expressly or impliedly appropriated, the legatee for life takes the income from the testator's death of such part of the residue as consists of securities authorised by the Court or by the will (*y*). But as to such part of the residue as ought to be converted, the legatee for life will be entitled, from the death of the testator, to the dividend on so much Consols as could have been purchased with the proceeds of such part of the residue had it been converted at the end of a year from testator's death (*z*).

Where there is no direction for conversion, and there is an express or implied intention in the instrument that the legatee for life is to take *in specie*, such legatee will take the whole income (*a*).

And so likewise where there is a direction to convert, but the

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(*t*) *Macdonald* v. *Irvine*, 8 Ch. D. 101, 123.

(*u*) *Re Wilson*, [1907] 1 Ch. 394; *Re Nicholson*, [1909] 2 Ch. 111.

(*x*) [1927] 1 Ch. 596. See sections 33 and 39 of the A. E. Act, 1925, and section 28, sub-section 2 of the L. P. Act, 1925.

(*y*) *Angerstein* v. *Martin*, T. & R. 232; *Hewitt* v. *Morris*, T. & R. 241; *La Terriere* v. *Bulmer*, 2 Si. 18; *Allhusen* v. *Whittell*, 4 Eq. 295; *Macpherson* v. *M.*, 16 Jur. 847; *Caldecott* v. *C.*, 1 Y. & C. C. C. 312.

(*z*) *Dimes* v. *Scott*, 4 Russ. 195; *Taylor* v. *Clark*, 1 Ha. 161; *Morgan* v. *M.*, 14 B. 72; *Allhusen* v. *Whittell*, 4 Eq. 295; *Brown* v. *Gellatly*, L. R. 2 Ch. 751; *Re Wareham*, [1912] 2 Ch. 312.

(*a*) See the principal case, and *Alcock* v. *Sloper*, 2 My. & K. 699; cf. *Re Eaton*, 70 L. T. 761; *Re Pitcairn*, [1896] 2 Ch. 199; *Re Wilson* and *Re Nicholson*, *supra*.

will shows an intention that until conversion the legatee for life is to take the actual income until conversion (*b*).

Where conversion is directed, and the income in the meantime is to be accumulated, and added to the capital, the accumulation is confined to one year from the testator's death, and from and after that period the tenant for life is entitled to the interest or rent directed to be accumulated (*c*).

Leaseholds.—Where there is a trust for conversion of leaseholds, with power for the trustees to postpone at discretion, it would seem that by the joint effect of section 28, sub-sections 2 and 5, and section 205, sub-section 1 (ix) of the L. P. Act, 1925, the whole income until sale is payable to the tenant for life (*d*).

Where a tenant for life is entitled to the enjoyment of leaseholds *in specie*, and they are taken by a public company, and the purchase-money is paid into Court, he is entitled to the same benefit thereout as he would have had from the lease (8 & 9 Vict. c. 18, s. 74), and as leasehold property is of a wearing-out character, it is evident that the mere interest of the purchase-money cannot be considered an adequate compensation to the tenant for life. Thus, in *Jeffreys* v. *Conner* (*e*), leaseholds bequeathed to one for life, with remainder over, were taken by a railway company, and the purchase-money was invested in Consols. The tenant for life only received the dividends. It was held that her estate was entitled, out of the Consols, to the difference between the dividends received and the aggregate amount of the rental which would have accrued during her life, if the leaseholds had not been taken (*f*).

Where the tenant for life outlives the term for which he is entitled as tenant for life, he will become absolutely entitled to the whole fund (*g*). In *Askew* v. *Woodhead* (*h*), a case of a settlement, the C. A. held the legatee for life was entitled to

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(*b*) *Mackie* v. *M.*, 5 Ha. 70; *Wrey* v. *Smith*, 14 Si. 202; *Re Sewell*, 11 Eq. 80; *Re Chancellor*, 26 Ch. D. 42; *Re Crowther*, [1895] 2 Ch. 56; *Re Thomas*, [1891] 3 Ch. 482; *Re Sheldon*, 39 Ch. D. 50; *Re Bates*, [1907] 1 Ch. 22; *Re Wilson*, [1907] 1 Ch. 394; and cf. *Re Chaytor*, [1905] 1 Ch. 233.

(*c*) *Sitwell* v. *Bernard*, 6 V. 520; Jarman (1910), p. 1232; Lewin, p. 336.

(*d*) *Re Brooker*, [1926] W. N. 93; and see *Re Trollope's Will Trusts*, [1927] 1 Ch. 596, 601.

(*e*) 28 B. 328.

(*f*) See also *Re Pfleger*, 6 Eq. 426; *Morris* v. *Hodges*, 27 B. 625; and *Re Money*, 2 Dr. & Sm. 94.

(*g*) *Re Beaufoy*, 1 Sm. & G. 20; and see *Phillips* v. *Sargent*, 7 Ha. 33.

(*h*) 14 Ch. D. 27.

receive an annuity of such an amount that the payment of it would exhaust the fund in the number of years which the leasehold (taken under the Lands Clauses Act) had to run (*i*).

When conversion cannot be effected without loss.—Where property given to persons in succession is found by the trustees, although not in authorised investments, to be secure and to produce a large annual income, and not to be capable of immediate conversion without loss and damage to the estate; there the rule is not to convert the property, but to set a value upon it, as at testator's death, and to give the legatee for life fair interest from the testator's death on such value, and the residue of the income must then be invested, and the income of the investment paid to the tenant for life, but the *corpus* must be secured for the remainderman (*k*). The rate of interest allowed was formerly 4 per cent. (*l*), but subsequently, with the fall in the rate of interest generally, it was reduced to 3 per cent. (*m*). Now, the rate has been again raised to 4 per cent. (*n*). In *Brown* v. *Gellatly* (*o*), the testator, after giving his property to trustees, with full power to realise the same when and in such manner as they might see fit, empowered them to sail his ships for the benefit of his estate, until they could be satisfactorily sold. The ships gained considerable earnings after the testator's death. "With regard to the ships," said Cairns, L.J., "the testator has put them simply in the position of property, which was to be converted cautiously, and in proper time, and as to which there was no breach of trust in the executors delaying to convert it, but which was, when converted, and when invested, to be enjoyed as the residue of his estate. In that state of things, it seems to me that this case falls exactly within the third division pointed out by Parker, V.-C., in the case of *Meyer* v. *Simonsen* (*p*), and that a value must be set upon the ships, as at the death of the testator, and the tenant for life must have 4 per cent. on such

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(*i*) See also *Re Barrington*, 33 Ch. D. 523; *Re Walsh*, 7 L. R. Ir. 554; *Re Wood*, 10 Eq. 572; *Re Griffith*, 49 L. T. 161; Settled Land Act, 1925, s. 79; and *Re Cottrell*, 28 Ch. D. 628; *Re Simpson*, [1913] 1 Ch. 277.

(*k*) *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; *Brown* v. *Gellatly*, *infra*, note (*o*); *Wentworth* v. *W.*, [1900] A. C. 163, 171; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107; *Re Woods*, [1904] 2 Ch. 4; Jarman (1910), p. 1235; Lewin, p. 338; Theobald, p. 560.

(*l*) *Meyer* v. *Simonsen*, 5 De G. & Sm. 723; *Wentworth* v. *W.*, [1900] A. C. p. 171.

(*m*) *Rowlls* v. *Bebb* and *Re Woods*, *supra*; *Re Chaytor*, [1905] 1 Ch. 233.

(*n*) *Re Beech*, [1920] 1 Ch. 40; and see *Re Owen*, [1912] 1 Ch. 519; *Re Baker*, [1924] 2 Ch. 271. (*o*) L. R. 2 Ch. 751. (*p*) 5 De G. & Sm. 723.

value, and the residue of the profits must of course be invested, and become a part of the estate" (*q*).

Income of Legacies.—The tenant for life of a residue is, as a matter of convenience, entitled to the income of a fund set aside for contingent legacies (*r*); but if it is set apart for vested legacies not yet payable, the income on the fund must be invested and treated as capital belonging to the remaindermen, the tenant for life receiving only the income thereon (*s*).

Where the residue includes a reversionary interest vested or contingent retained unconverted, under a power to postpone conversion, and there is no direction in the will to the effect that the tenant for life shall be entitled only to the income of property actually producing income, then on the reversion falling in, the sum produced by its realisation is apportioned between the tenant for life and the remaindermen on the principle laid down in *Re Chesterfield's Trusts* (*t*). The sum is ascertained which, put out at interest on the day of the testator's death, and accumulating at compound interest, with yearly rests and deducting income tax, would, with the accumulations of interest, have produced the amount actually received; and the sum so ascertained is *corpus* and the balance is income (*u*). The rate of interest taken in such a case, which had been reduced to 3 per cent. (*x*), has now been increased again to 4 per cent. (*y*). The rule applies where trustees fail to exercise their discretion as to the conversion of reversionary interests (*z*).

Where the tenant for life is under the will entitled to the income of property actually producing income and part of an asset is recovered, then the amount so recovered will be treated as representing capital and income, and will be apportioned between the tenant for life and the remaindermen on the rule in *Re Chesterfield's Trusts* (*a*). If the whole amount of a mortgage

(*q*) L. R. 2 Ch. 758. See also *Wilkinson* v. *Duncan*, 23 B. 469; *Yates* v. *Y.*, 28 B. 637; *Re Llewellyn's T.*, 29 B. 171; *Simpson* v. *Lester*, 4 Jur. (N.S.) 1269; *Arnold* v. *Ennis*, 2 Ir. Ch. R. 601; *Re Eaton*, 70 L. T. 761; *Re Hill*, 50 L. J. Ch. 551. (*r*) *Cranley* v. *Dixon*, 23 B. 512; *Allhusen* v. *Whittell*, 4 Eq. 295.

(*s*) *Crawley* v. *C.*, 7 Si. 427; *Re Whitehead*, [1894] 1 Ch. 678; cf. *Re Thomas*, [1891] 3 Ch. 482; *Re Hawkins*, [1916] 2 Ch. 570.

(*t*) 24 Ch. D. 643. For the earlier rule, see *Wilkinson* v. *Duncan*, 23 B. 469; *Wright* v. *Lambert*, 6 Ch. D. 649.

(*u*) *Re Hobson*, 55 L. J. Ch. 422; *Re Goodenough*, [1895] 2 Ch. 537; *Re Morley*, [1895] 2 Ch. 738.

(*x*) *Re Goodenough*, *supra*; *Rowlls* v. *Bebb*, [1900] 2 Ch. 107.

(*y*) *Re Baker*, [1924] 2 Ch. 271. (*z*) *Rowlls* v. *Bebb*, *supra*.

(*a*) *Re Godden*, [1893] 1 Ch. 292; cf. *Turner* v. *Newport*, 2 Ph. 14; *Duke of Cleveland's Estate*, [1895] 2 Ch. 542.

debt and interest thereon is recovered, the tenant for life or his estate will be entitled to the interest (*b*). If a less amount is recovered, then it must be apportioned between the tenant for life and the remaindermen in the proportion that the interest due from the date of the mortgage bears to the capital sum thereby secured (*c*).

The rule in *Re Chesterfield's Trusts*, *supra*, applies where there is a loss to be borne. So where the residue included a leasehold on which the business of the testator was carried on, it being for the advantage of all persons interested that it should be retained and managed by the trustees, the Court ordered an apportionment of loss and gain on the principle above stated (*d*).

Residue.—The legatee for life must keep down the interest on debts, and as between the legatee for life of a residue and the remainderman, there is no residue until debts and legacies are paid, and as between them the rule is that debts and legacies must be taken to have been paid out of such portion of the capital as together with the income of that portion, for one year from the testator's death, is sufficient to make such payment (*e*).

Shares in Companies.—Where a company has power to distribute its profits as dividends, or convert them into capital, all persons claiming under the settlor are bound by its exercise (*f*).

Inquiries.—Inquiries may be directed as to continuing or calling in securities; as to how much of the funds has arisen from interest and how much from capital; as to the value of leaseholds and other property not invested in Consols at testator's death, etc. (*g*).

4. Duties and Liabilities of Trustees as to Conversion.

Where there is a duty to convert, the rule *prima facie* is that the conversion should take place within the year from testator's

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(*b*) *Re Lewis*, [1907] 2 Ch. 296; cf. *Re Broadwood's Settlements*, [1908] 1 Ch. 115.

(*c*) *Re Hubbuck*, [1896] 1 Ch. 754; *Re Coaks*, [1911] 1 Ch. 171; *Re Horn*, [1924] 2 Ch. 222.

(*d*) See *Re Hengler's Trusts*, [1893] 1 Ch. 586, where the form of order is given, and cf. *Upton* v. *Brown*, 26 Ch. D. 588; *Re Atkinson*, [1904] 2 Ch. 160; *Re Bird*, [1901] 1 Ch. 916; *Re Coaks* and *Re Horn*, *supra*.

(*e*) Seton (1912), p. 1618; *Holgate* v. *Jennings*, 24 B. 623; *Allhusen* v. *Whittell*, 4 Eq. 295; *Marshall* v. *Crowther*, 2 Ch. D. 199. See now section 33, sub-section 5 of Administration of Estates Act, 1925.

(*f*) *Re Malam*, [1894] 3 Ch. 578; *Bouch* v. *Sproule*, 12 A. C. 385; *Re Nicholson*, [1909] 2 Ch. 111; *Re Evans*, [1913] 1 Ch. 23.

(*g*) Seton (1912), p. 1614; *Caldecott* v. *C.*, 1 Y. & C. C. C. 312, 737.

death (*h*). As to the investments of trustees and executors authorised by law, see Trustee Act, 1925, s. 1.

Executors or trustees neglecting to convert wasting or improper securities bequeathed in succession, and permitting the legatee for life to receive more than he would have done if conversion had been duly effected, will be guilty of breach of trust (*i*), and will be entitled in passing their accounts to an allowance *only* of the dividends which the legatee for life would have been entitled to if the securities had been converted within a year from the testator's death. If the security, when realised, produces more than it would have produced if sold at the end of the year, they will not be entitled to set off this gain (*k*). But by an inquiry in the same suit they may recoup themselves against the legatee for life the amount overpaid to him (*l*).

The above observations must be read as qualified by section 25 of the Law of Property Act, 1925 (*m*) :—

" 25.—(1) A power to postpone sale shall, in the case of every trust for sale of land, be implied unless a contrary intention appears.

" (2) Where there is a power to postpone the sale, then (subject to any express direction to the contrary in the instrument, if any, creating the trust for sale) the trustees for sale shall not be liable in any way for postponing the sale, in the exercise of their discretion, for an indefinite period; . . .

" (3) The foregoing provisions of this section apply whether the trust for sale is created before or after the commencement or by virtue of this Act.

" (4) Where a disposition or settlement coming into operation after the commencement of this Act contains a trust either to retain or sell land, the same shall be construed as a trust to sell with power to postpone the sale " (*n*).

(*h*) *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; cf. *The Heirs of Hiddingh* v. *De Villiers, etc.*, 12 A. C. 624; *Dunning* v. *Earl of Gainsborough*, 54 L. J. Ch. 991, 997.

(*i*) *Bate* v. *Hooper*, 5 De G. M. & G. 338.

(*k*) *Dimes* v. *Scott*, 4 Russ. 195.

(*l*) *Hood* v. *Clapham*, 19 B. 90; and see *Tickner* v. *Old*, 18 Eq. 426; *Grayburn* v. *Clarkson*, L. R. 3 Ch. 605; *Re Llewellyn's T.*, 29 B. 171; *Mara* v. *Browne*, [1895] 2 Ch. p. 89; reversed on evidence, [1896] 1 Ch. 199; *Re Somerset*, [1894] 1 Ch. 231; Trustee Act, 1925, s. 62.

(*m*) See also, for cases of intestacy, section 33, sub-section 5 of Administration of Estates Act, 1925.

(*n*) As to intermediate income where a power of postponement is exercised, see Law of Property Act, 1925, s. 28, sub-s. 2.

ASSIGNMENT.

WARMSTREY *v.* TANFIELD.

4 Car. 1. 1 Ch. R. 29.

Possibility Assignable in Equity.

A grant of a future possibility not good in law, yet a possibility of a trust may be assigned in equity.

The plaintiff's title appeared to be, that one William Freeman, being possessed of the third part of the parsonage for the whole term to come, granted all his interest therein to one Alborough, in trust for the use of the said William Freeman and Alice his wife, during their lives, and after to the use of such issue male of their two bodies as the said William should by will appoint; and after, the said William appointed the premises after the death of the said Alice unto Richard Freeman, son of the said William and Alice; and that the said interest in law of the said Alborough came by mesne conveyance unto John and Robert Palmer; and that the said Richard Freeman, during the life of the said Alice, who not long after died, assigned the premises unto the plaintiff, and also released to the plaintiff, and the said Palmers assured their interest in law in the said premises to the plaintiff.

The defendant insists, for title, that the said Richard Freeman, about two years after his assignment aforesaid to the plaintiff, made a lease of the premises to Walter Thomas and John Makerith, who passed their estate to one Evans, and Hawkins, in trust for the defendant the Lady Tanfield, and had possession given her.

This Court (*a*), with the Judges, taking consideration of the said assignments, grants, and release, were of opinion, and

(*a*) Lord Coventry was Lord Keeper.

declared, that *howbeit a grant of a future possibility is not good in law* (*b*), *yet a possibility of a trust in equity might be assigned*, and the said Richard Freeman's assignment of his said trust unto the plaintiff is also confirmed by the assignment of the said Palmer, who had the interest in law, and the said plaintiff's assignment is also precedent to the deed made to the said Thomas, by which the said defendant, the Lady Tanfield, claimeth the said lease.

(*b*) See *Lampet's Case*, 10 Co. 47a, 48b.

ROW *v.* DAWSON.

1749. 1 Ves. Sen. 331 (*a*).

Chose in Action Assignable in Equity.

A borrows money of B, and gives him a draft upon a fund due to him (A) out of the Exchequer, which was deposited with the officer from whom the fund was payable. A afterwards becomes bankrupt; this is an assignment thereof to B for valuable consideration, which shall prevail against the general assignees under the commission of bankruptcy.

A chose in action, though not assignable at law, is assignable in equity, and no particular form of words is necessary.

Tonson and Conway lent money to Gibson, who made a draft on Swinburn, the deputy of Horace Walpole, viz., "Out of the money due to me from Horace Walpole out of the Exchequer, and what will be due at Michaelmas, pay to Tonson and Conway, value received."

Gibson became bankrupt; and the question was whether the defendants Tonson, and the executors of Conway, were first entitled by a specific lien upon this sum due to the estate of Gibson; or whether the plaintiffs, the assignees under the commission, were entitled to have the whole sum paid to them; it being insisted for them, that this draft was in the nature of a bill of exchange, and that the property was not divested out of the bankrupt at the time of the bankruptcy, in law or equity.

Lord Chancellor Hardwicke.—At first I little doubted about my own jurisdiction, and whether the plaintiffs ought not to have gone into the Exchequer, as being a Court of revenue; for this is not a personal credit given to, or demand upon, the officer, but to be paid out of that money issued out of the Exchequer to the officer; and this is on warrant, to be paid out of the revenue of the Crown for public services. But there is some-

(*a*) Reg. Lib. 1749, B., fol. 89.

thing in the present case delivering it from that: the officer admits he has received a sum of money applicable to this demand, which brings it to the old case of a liberate (*b*), which a person has under the Great Seal for the payment of money; upon admission that the officer had money in his hands applicable to the payment, and proof thereof, that would give Courts of law a jurisdiction, so that an action of debt might be maintained on the liberate.

This demand, and the instrument under which the defendants claim, is not a bill of exchange, but a draft, not to pay *generally*, but out of this *particular fund*, which creates no personal demand; therefore, not a draft on personal credit, to go in the common course of negotiation, which is necessary to bills of exchange, by draft on the general credit of the person drawing, the drawee, and the indorser, without reference to any particular fund. The first case of which kind, I remember to have been determined in B. R. not to be a bill of exchange, was a draft by an officer on the agent of his regiment, to be paid out of his growing subsistence. Then what is it, for it must amount to something? *It is an agreement, for valuable consideration beforehand, to lend money on the faith of being satisfied out of this fund*; which makes it a very strong case. If this is not a bill of exchange, nor a proceeding on the personal credit of Swinburn or Gibson, *it is a credit on this fund, and must amount to an assignment of so much of the debt*: and, *though the law does not admit an assignment of a chose in action, this Court does; and any words will do, no particular words being necessary thereto.*

In the case of a bond, it may be assigned in equity for valuable consideration, and good, although no special form used. Suppose an obligee receives the money on the bond, and there is wrote on the back of it, "Whereas I have received the principal and interest from such a one, do you the obligor pay the money to him." This is just that case; only it is not a debt arising from specialty: therefore, like an assignment of rent, by direction to

(*b*) A writ that lay for the payment of a yearly pension or other sum of money, granted under the Great Seal, and addressed to the Treasurer and Chamberlains of the Exchequer.

a tenant or steward to pay so much of a year's rent to a third person.

The case of *Ryall* v. *Rowles* (*c*), now under the consideration of the Court, occurred to me. There the assignment of debts, of which no possession, came in question; but those are debts depending on partnership, and mentioned there how far the assignment of a bond should be supported against the assignees under the commission; and it is clear that they have been supported where the bond has been delivered over; but if not, some doubt has been, whether it should be supported on the foot of the clause (*d*) in the statute 21 Jac. 1, c. 19.

But this is clear of that doubt, because this was a debt due to Gibson without any specialty. This draft, which amounts to an assignment, *is deposited with the officer* Swinburn, and therefore it attached immediately upon it; so that Swinburn could not have paid this money to Gibson, supposing he had not been bankrupt, without making himself liable to the defendants; because he would have paid it with full notice of this assignment, for valuable consideration.

(*c*) 1 Ves. Sen. 348. See next page.
(*d*) Section 10.

RYALL *v.* ROWLES.

1747-1750. 1 Ves. Sen. 348.

Assignment of Debts without Notice to Debtor, Invalid against Assignees in Bankruptcy.

Assignee by way of mortgage of goods and chattels, or choses in action, allowing the assignor to continue in the possession or in the order and disposition of them, will, upon the construction of 21 Jac. 1, c. 19, ss. 10 and 11 (*a*), have no specific lien on them against his assignees in bankruptcy.

William Harvest, a trader within the several statutes concerning bankrupts, in June, 1732, borrowed from Benjamin and Joseph Tomkins £1,500, and, as a security, conveyed and assigned his dwelling-house and brew-house at Kingston, and all the coppers and utensils in trade belonging thereto, by way of mortgage, subject to redemption.

He afterwards took Jonathan Stephens into partnership with him, and in less than a month after the partnership, December 22, 1736, made a second mortgage to Potter, in trust for Jonathan Stephens, of his moiety of not only the utensils, but the stock in trade, *debts*, *profits*, *etc.*, for securing a sum of money then lent to him by Jonathan Stephens, and any future sums that should be lent.

December 10, 1737, he made a third mortgage of the seventh part of his undivided moiety of all the stock in trade, utensils, *debts due or to grow due*, to Sir James Reynel.

April 24, 1738, he made a fourth mortgage of the seventh part of his undivided moiety, with the same description, to Skip.

September 7, 1738, he made a fifth mortgage to Jonathan Stephens, for securing to him £2,000, which Stephens had paid to one Baugh, who had the original mortgage on the freehold estate; the real premises, which were conveyed by way of lease to Tomkins having been mortgaged to Philip Stone in 1725, and

(*a*) Repealed, but, with modifications, re-enacted by subsequent statutes. See the Bankruptcy Act, 1914, s. 38, sub-section 2 (c).

assigned to Baugh, who assigned to Stephens upon being paid the £2,000.

He afterwards made a sixth mortgage to George Harvest, his son, of the seventh part of his undivided moiety of the partnership, stock in trade, *debts*, utensils *and profits*, in consideration of a sum of money lent.

Notwithstanding these several mortgages, he *continued in possession of the utensils and stock in trade as before*, altered, disposed, and mortgaged them as his own, and *received the debts in partnership* with Stephens, without any control from any of the mortgagees till 1740, when he failed and became bankrupt.

Then the assignees and mortgagees insisted on the right to the several goods, stock, etc., comprised in their several assignments, in opposition to the general creditors claiming under the commission.

The cause was heard before Lord Chancellor Hardwicke, the Seal after Michaelmas, 1747, and it being a new case, his Lordship ordered it to be argued by two counsel on each side, assisted by the Judges (*b*).

Solicitor-General (the Hon. William Murray (*c*)), and Mr. Noel, for the assignees under the commission.

Attorney-General (Sir Dudley Rider), and Mr. Wilbraham for all the mortgagees.

[The judgments of Burnett, J., Parker, C.B., and Lee, C.J., are omitted.]

Lord Chancellor Hardwicke.—I am obliged to the Judges for their assistance and endeavours to give light in so intricate a case, which intricacy arises in respect of the want of a number of authorities as to the construction of this Act of Parliament, though made so long ago. But a greater intricacy occurs in respect of the conduct of William Harvest, in making these securities. All the authorities giving light to this have been

(*b*) February 24, 1747-8.
(*c*) Afterwards Lord Mansfield.

exhausted by the Judges, and it would be mis-spending of time to repeat what has been said. It is sufficient, therefore, to say, I concur in the opinion delivered; but as this is a case of great expectation and consequence, I will reduce the grounds to some general principle. * * *

Choses in action are properly within the description of goods and chattels within this clause (*d*); and I will only add one argument, for the sake of which I mention it, which is, that this construction is strongly warranted by the next preceding clause, relating to bankrupts who by fraud make themselves accountant to the King, to defeat their private creditors, which plainly shows that the words *goods and chattels*, as used in this Act, take in all kind of personal property of the bankrupt, whether in possession or action only; which strongly supports the construction made by the Judges, and is agreeable to *Ford and Sheldon's Case*, 12 Co. 1, where it is held, that, in an Act of Parliament, *goods and chattels* take in *choses in action*. The reason of the other opinion in the books arises from hence, that this question has arisen on a grant or assignment, or bargain and sale, not being such goods and chattels as would pass by that assignment or conveyance; but in an Act of Parliament, which can pass anything, they are always included.

I go on four general principles in the construction of this Act.

First, the aim and intent of the Legislature was, that an equal proportion of the effects of the bankrupt among his creditors should be attained as far as possible.

Secondly, that, to attain that end, these Acts of Parliament should be construed beneficially for the general creditors under the commission; and therefore it is, in an unusual manner, different from most Acts of Parliament, enacted, that all these statutes and laws shall be largely and beneficially construed for the creditors in general under the commission.

Thirdly, it appears, the general view and intent of the provision now under consideration was, to prevent traders from

(*d*) Section 11 of 21 Jac. 1, c. 19. The reputed ownership clause does not now apply to choses in action, other than "debts due or growing due to the bankrupt in the course of his trade or business." See *infra*, p. 131.

gaining a delusive credit, by a false appearance of substance to mislead those who should deal with them.

Fourthly, the Legislature judged they might do this by subjecting all the goods of the bankrupt, though conveyed to others, to the general creditors under the commission, because, where the vendee or assignee leaves such goods in possession of the bankrupt as owner, he confides as much in the general credit of the bankrupt as that creditor who has only taken his bond or note. It is, in such case, put in the power of the bankrupt to sell the goods the next day; the former assignee could only have a personal remedy against the bankrupt.

All these grounds go to the substance of the case, and not upon niceties, and hold in case of a mortgage as well as an absolute sale; otherwise it would be contrary to the resolution of *Stephens* v. *Sole*, and the opinion of Lord Cowper in *Buckner* v. *Royston* (*e*), and to his implied opinion in *Copeman* v. *Gallant* (*f*), and would overturn this part of the statute, and restrain it to absolute sales. Traders, instead of absolute sales, would then make such mortgages, and there would be a greater opportunity; for traders might mortgage over and over again, as this case is a pregnant instance.

As to the most material and operative expression, the Legislature has explained their own sense, by putting the words *true owner* in opposition to *reputed*, not *special owner*; and then these last words can only mean a person, who, by specious acts of possession, order and disposition, gives himself an appearance of property he has not really, (which is the present bankrupt's case,) till the mortgage money is paid.

Then it follows that the mortgages to Reynel, Skip, and George Harvest, and so much of the assignment to Stephens as relates to the utensils not fixed to the freehold, which are made a further security to him, must be void within this clause, so far as they are claimed to be specific liens.

The distinction endeavoured has been answered; and the distinction most laboured, that a share of a partner in a partnership stock is only a sort of proportion arising on the balance of

(*e*) Pr. Ch. 285.

(*f*) 1 P. W. 314.

the partnership account, and incapable of being delivered, would let in that false, delusive credit (intended to be prevented) in all trades in partnership, and would extend to particular goods in partnership.

As to choses in action comprised in these securities, where it is admitted none could pass but in equity, equity ought to follow the law in this case, if in any. Where property is established by Act of Parliament, equity follows it in like manner as where established by common law; for if not, it would cause great confusion; and it is always so taken on Acts of Parliament made concerning real and personal estate, regulating that kind of property; for which there is a strong instance in the statutes relating to Papists; for, though subject to penal laws, equity regulates in the same way, by the same rule, as the statutes lay down concerning legal property.

The third and last point is in the construction of Potter's mortgage, which is said to be directly as if made to Stephens; and, I think, upon the whole, it would be so; though, perhaps, if it was nicely scrutinised, some difference might be taken; but whatever legal interest, that vested in Potter. And the law would not have taken notice of the trust if the question was at law; and, therefore, if this Act of Parliament has made it void at law, this Court would never set it up contrary to law for the sake of Stephens, because he was a partner, but would let the law take place for the benefit of the general creditors. As to any of these goods in that mortgage, which equity only could pass, equity will follow the law; for as to the profits arising from trade and choses in action, there could not be an equity upon an equity: equity would vest them in Stephens, and it would undoubtedly be considered as if the assignment had been directly to Stephens. And here the principal objection arises; it being said, it vested in Stephens as to these particulars, and that Stephens was partner then, and if he had not taken this mortgage, he would be entitled to have an allowance out of what would be coming to Harvest's moiety, and would have a specific lien on that moiety; and therefore Stephens, taking a mortgage of the other share, would not be put in a worse condition than without it. This was the most plausible thing urged for the defendant,

and would be right if the foundation was right; but I dispute their foundation, which must be that the party so lending gains a special lien on the partner borrowing, and should be allowed a preference to his separate creditors; but for this there is no authority or precedent after a bankruptcy; it is a different consideration, what a Court of equity might do between the parties themselves, while both remained capable of transacting for themselves. But I might carry it further; for it is so after the death of a partner, where his effects come to be distributable as assets. In the case of *Meliorucchi* v. *Royal Exchange Assurance Company* (*g*), the points determined are not material to the present; but there the attempt made was to subject stock after a bankruptcy to a debt contracted to the company by a loan of money, and arguments were drawn from rules concerning partnership; but it was not contended for, that in case of a partnership, that could be carried further. And the case cited, of *Croft* v. *Pike* (*h*), is as strong as any negative authority can be; for there it was not attempted to give the surviving partner a right of retainer, or bringing into the partnership account a bond debt, so as to be preferred to others, but only as executor; and therefore the money taken by a deceased partner out of the partnership stock, was allowed to be brought into the partnership account, but the bond debt was not, because a separate loan and transaction. If, then, by a new determination now, it should be admitted, and that one partner, by lending money to another in a separate capacity, not relative to the partnership, should gain a specific lien on the effects of the partner so borrowing, it would open a door to fraud, and so defeat this statute; for then a person might be taken in as a partner into a moiety of a great stock of flourishing trade, and he may have a separate credit on that confidence, and yet may not have any in reality of the property in that stock, but the whole may belong to others; which tends plainly to great fraud and imposition on traders and great mischief. It has been said, that great mischief might arise to trade and credit from such a determination as this, as tending to prevent making use of that credit persons have to support them-

(*g*) 1 Eq. Ca. Abr. 8, pl. 8.

(*h*) 3 P. W. 180.

selves in trade, as they cannot make a security without exposing their circumstances to the world; and on the other hand it is contended, that the other construction would in fact repeal the Act of Parliament, and let in a mischief. Some inconvenience might perhaps arise from a determination of this case on either side; but I agree with Lee, C.J., that, as this is a law, we must adhere to it, and while it is a law, be bound by it, and if any inconvenience results from it, that is for the consideration of the Legislature. But this I will say, that, as some inconvenience may be to particular persons on one hand, great inconvenience may be on the other, by creating that appearance, as having the substance of which they remain in possession, though they have not at all the real property; and that this was the intent of the Legislature, I am clear; and I may go so far as to say, that the simplicity of those times did not let in these large and airy notions of credit, as of late, which from the number of bankruptcies we have had of late years, is rather an evidence that the departing from the rule this law has laid down, and giving way to these notions, has been rather a mischief.

I agree, then, that these mortgages cannot prevail as specific liens and securities; therefore, as to the mortgages of lands and fixtures, they are not affected by the Act of Parliament: but what is affected by the direction therein is the assignment to Stephens (for Potter must be considered as a trustee for him) relating to any utensils not fixed to the freehold. So also are all the four mortgages of seventh part, by reason of the bankruptcy of William Harvest, made void by the statute, and can create no specific lien on the bankrupt's share of partnership stock, debts, and effects; but they must be considered only as general creditors.

NOTES.

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1. Generally.

"The great wisdom and policy of the sages and founders of our law," says Coke, "have provided, that *no possibility, right, title, nor thing in action, shall be granted or assigned to strangers*, for that would be the occasion of multiplying of contentions and suits, of great oppression of the people, and chiefly of terre-tenants, and the subversion of the due and equal execution of justice" (*i*). The common law principle above stated prevented the assignment and transfer *inter vivos* of (1) contractual rights, (2) of possibilities, under which head were included at the common law not only bare possibilities, mere expectations of beneficial rights and interests not based on any existing instrument, such as the expectation of benefits under the will of a living person, but also possibilities coupled with an interest, contingent remainders, and executory interests (*k*). Into the origin of this principle it is unnecessary here to go, the matter is discussed in the authorities referred to in the note (*l*).

By way of exception to the above principle the King could either grant or receive a possibility or chose in action by assignment (*m*) and by the Law Merchant bills of exchange were negotiable.

In equity, however, both the possibility and the chose in action became assignable. The validity of an assignment of a chose in action was recognised early in the seventeenth century and from the same period effect was given to assignments and contracts for the assignment of possibilities (*n*). The assignment both of the chose in action and the possibility was regarded as in the nature of a contract to which full effect was given by applying equitable principles. In Lord Macnaghten's words (*o*) "an assignment of future property for value operates in equity by way of agreement,

(*i*) *Lampet's Case*, 10 Rep. 48a.
(*k*) Challis Real Property (3rd ed.), p. 76.
(*l*) Pollock on Contracts (9th ed.), 232, and Appendix F; Spence, Equitable Jur. etc (vol. II), 850.
(*m*) Co. Litt. 232 b. n. 1; *Miles* v. *Williams*, 1 P. W. 252; *Stafford* v. *Buckley*, 2 Ves. Sen. 177, 181.
(*n*) See cases collected in Ashburner on Equity, in notes pp. 321 and 334.
(*o*) *Tailby* v. *Official Receiver*, 13 A. C. 523, at p. 546.

binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers that done which ought to be done and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that wherever persons agree concerning any particular subject, that, in a Court of equity, as against the party himself, and any claiming under him voluntarily or with notice raises a trust : *Legard* v. *Hodges* (*p*).'" In so effectuating an assignment the Court acted independently of the doctrine of specific performance, for an assignment could be enforced even though specific performance was impossible (*q*). Considerations applicable to cases of specific performance, properly so called, when the consideration is executory are not to be applied to every case of equitable assignment dealing with future property. "Cases of equitable assignment or specific lien, *where the consideration has passed*, depend on the real meaning of the agreement between the parties. The difficulty generally speaking is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case" (*r*).

Where an equitable assignment was made of property recoverable in Courts of equity, hence called *choses in equity*, such as the beneficial interest in personalty under a will or intestacy, stock standing in the names of trustees, or in the Court, money in Court, judgments enforceable in equity, the beneficial interest in a legal debt assigned to trustees, etc., the assignee could sue in his own name *in equity* for such property; but where there was an *equitable* assignment made of things only recoverable at law—commonly called *choses in action*—the assignee could not sue in his own name, but he was obliged to do so in the name of the assignor, whom a Court of equity would compel to allow his name to be used for that purpose (*s*).

The equitable rules as to notice are hereinafter dealt with in detail; here it is only necessary to note that (1) as between assignor

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(*p*) 1 V. 478.

(*q*) *Metcalfe* v. *Abp. of York*, 1 My. & Cr. 547; *Western Waggon, etc., Co.* v. *West*, [1892] 1 Ch. at p. 275.

(*r*) *Tailby* v. *Official Receiver*, 13 A. C. p. 547.

(*s*) See *per* Chitty, L.J., in *Durham Bros.* v. *Robertson*, [1898] 1 Q. B., at p. 769.

and assignee, though notice to the person indebted is not necessary to complete the title of the assignee (*t*), it is obviously desirable in order to prevent the person indebted paying the assignor or a subsequent assignee for value who had given notice, and by such payment obtaining a valid discharge; (2) as between successive assignees priority is determined *prima facie* by the order in time of the notices of assignment. The history and basis of this rule is discussed by Lord Macnaghten in *Ward* v. *Duncombe* (*u*).

By statute the common law principle enunciated by Coke has been greatly changed.

First, as to the transfer of possibilities.—By the Real Property Act, 1845, s. 6, it was enacted that after the first day of October, 1845, a contingent, an executory, and a future interest, and a possibility coupled with an interest in any tenements or hereditaments of any tenure, whether the object of the gift, or limitation of such interest, or possibility, be or be not ascertained; also a right of entry, whether immediate or future and whether vested or contingent, into or upon any tenements or hereditaments in England, or any tenure, might be disposed of by deed.

It will be observed that this provision, which has now been replaced by section 4, sub-section 2 of the Law of Property, 1925, did not render assignments of contingent interests, or possibilities in chattels, or mere naked possibilities not coupled with an interest, valid at law; the exclusive jurisdiction, therefore, of the old Courts of equity as to such assignments was untouched by the Act.

Secondly, as to the assignment of choses in action.—In process of time, in addition to bills of exchange assignable by custom, other *choses in action* became assignable at law, by statute, as promissory notes, 3 & 4 Anne, c. 9, 7 Anne, c. 25; bail and replevin bonds by 4 Anne, c. 16, s. 20, 11 Geo. 2, c. 19; railway, 8 & 9 Vict. c. 19, administration, 20 & 21 Vict. c. 77, ss. 81, 83, and exchequer (*x*) bonds; bills of lading if endorsed, 18 & 19 Vict. c. 111; East India Bonds, 51 Geo. 3, c. 64, s. 4; mortgage debentures issued by the Land Companies under the Mortgage Debenture Act, 1865, 28 & 29 Vict. c. 20; shares in companies, Companies Act, 1908, s. 22; transferable debentures under the County Debenture Acts, 1873; policies of life assurance, 30 & 31

(*t*) *Gorringe* v. *Irwell, etc.*, 34 Ch. D. 128.
(*u*) [1893] A. C. 384 *et seq.*
(*x*) *Vertue* v. *East Angl. Ry. Co.*, 5 Exch. 280.

Vict. c. 144 (*y*); and policies of marine insurance (*z*); the choses in action of bankrupts (*a*); and the Law of Property Act, 1925, s. 136 (re-enacting the Judicature Act, 1873, s. 25, sub-s. 6), contains a general provision making any debt or other legal chose in action assignable at law on the conditions therein mentioned.

The equitable assignment of choses in action, whether legal or equitable, is unaffected by the provisions of the Judicature Act, or the Law of Property Act, 1925, and since the rules governing the equitable assignment of legal choses in action are less stringent than the rules governing legal assignment of choses in action, the topic of equitable assignment of choses in action remains of importance (*b*). Further, subject to the very wide statutory modifications referred to above, the common law rules preventing the legal transfer of possibilities, and non-existing property, still remain.

2. Rights and Interests Assignable in Equity though not at Law; Expectant Interests.

The following interests are assignable in equity, or treated as bound by a contract to assign, where the transaction is for valuable consideration :—

Possibilities. Contingent interests (*c*), or expectancies, as that of an heir-at-law to the estate of his ancestor (*d*); the interest which a person may take under the will of another then living (*e*); or the share to which such person may become entitled under an appointment (*f*); or an interest in money which may come to a person under a discretionary power in trustees to allow him maintenance (*g*); or in personal estate, as presumptive next-of-kin of

(*y*) *Scottish, etc., L. A. S.* v. *Fuller*, 2 Eq. 58; *Newman* v. *N.*, 28 Ch. D. 674.

(*z*) 31 & 32 Vict. c. 86; see *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299; *North of England, etc., Co.* v. *Archangel, etc., Co.*, L. R. 10 Q. B. 249.

(*a*) 32 & 33 Vict. c. 71, s. 111.

(*b*) See *per* Lord Macnaghten in *Brandts, etc.* v. *Dunlop, etc.*, [1905] A. C. p. 461. Certain of the observations of Lord Macnaghten in this case are commented on in *Performing Right Society* v. *London Theatre of Varieties*, [1924] A. C. 1.

(*c*) *Wind* v. *Jekyl*, 1 P. W. 572, at p. 574.

(*d*) *Hobson* v. *Trevor*, 2 P. W. 191; *Wethered* v. *W.*, 2 Si. 183, 192; *Smith* v. *Baker*, 1 Y. & C. C. C. 223; but see *Carleton* v. *Leighton*, 3 Mer. 677; *Re Vizard's Trusts*, L. R. 1 Ch. 588; *Public Trustee* v. *Wolf*, [1923] A. C. 544.

(*e*) *Beckley* v. *Newland*, 2 P. W. 182; *Lyde* v. *Mynn*, 1 My. & K. 693; but see *Pope* v. *Whitcomb*, 3 Russ. 124.

(*f*) *Musprat* v. *Gordon*, 1 Anst. 34.

(*g*) *Re Coleman*, 39 Ch. D. 443; and see *Re Neuberger's Settlement*, [1923] 1 Ch. 508.

a person then living (*h*); and in each case when any such interest falls into possession, the assignment, if definite, will, it seems, be enforced.

It should be observed, however, that an assignment of a mere possibility or *spes successionis* will pass no interest unless made for value (*i*). And where made for value, the transaction will only be treated as creating a contract enforceable in equity if the words are sufficiently precise and definite to catch the particular interest (*k*).

Non-existing Property.—Non-existing property, to be acquired at a future time, though not assignable at law (*l*), is clearly so in equity; the assignment, for instance, of future freight (*m*), of future patent rights (*n*), of profits arising from the working of a patent by licensees (*o*), of future dividends upon proof in bankruptcy (*p*), of the future cargo of a ship (*q*), of building materials to be brought on premises (*r*), or machinery at a future time to be added to or substituted for existing machinery (*s*), of goods and chattels now being, or which shall hereafter be, in or about a messuage or house (*t*) is valid in equity. An assignment by bill of sale of "all the book debts due and owing, or which may during the continuance of this security become due and owing, to the said mortgagor," is a good assignment, and passes the equitable interest in book debts incurred after the assignment, whether in the business then carried on by the mortgagor or in any other business (*u*). A company acting within its powers can mortgage its future or uncalled capital (*x*).

(*h*) *Hinde* v. *Blake*, 3 B. 235; *Meeke* v. *Kettlewell*, 1 Ph. 347; *Re Parsons*, 45 Ch. D. 51.

(*i*) *Meek* v. *Kettlewell*, 1 Ha. 464; 1 Ph. 342; *Re Parsons*, 45 Ch. D. 51.

(*k*) See the judgments in *Re Mudge*, [1914] 1 Ch. 115.

(*l*) *Robinson* v. *Macdonald*, 5 Mau. & Selw. 228.

(*m*) *Brown* v. *Tanner*, L. R. 3 Ch. 597; *Wilson* v. *W.*, 14 Eq. 32.

(*n*) *Printing, etc., Co.* v. *Sampson*, 19 Eq. 462.

(*o*) *Bergmann* v. *Macmillan*, 17 Ch. D. 423.

(*p*) *Re Irving*, 7 Ch. D. 419.

(*q*) *Curtis* v. *Auber*, 1 J. & W. 526; *Douglas* v. *Russel*, 4 Si. 524; *Langton* v. *Horton*, 1 Ha. 549; *Lindsay* v. *Gibbs*, 22 B. 522; *Gardner* v. *Cazenove*, 1 H. & N. 423.

(*r*) *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Hart* v. *Porthgain Harbour Co.*, [1903] 1 Ch. 690.

(*s*) *Holroyd* v. *Marshall*, 10 H. L. Cas. 191. (*t*) *Ex p. Games*, 12 Ch. D. 314.

(*u*) *Tailby* v. *Official Receiver* (1888), 13 A. C. 524; *Re Turcan* (1888), 40 Ch. D. 5; and see *Re Coleman*, 39 Ch. D. 443; *Performing Right Society* v. *London Theatre of Varieties*, [1924] A. C. 1.

(*x*) *Re Pyle Works* (1890), 44 Ch. D. 534; *Newton* v. *Anglo-Austr., etc.*, [1895] A. C. 244; *Re Mayfair Property Co.*, [1898] 2 Ch. 28.

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Choses in action are not personal chattels within the Bills of Sale Act, 1878, and the Amendment Act, 1882; see section 4 of the Act of 1878 (*y*).

It may be here noted that rights under agreements of a personal nature are not assignable either at law or in equity. The right of assignment is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to perform it (*z*). Thus agreements between authors and publishers, even though the publisher be a limited liability company, are not assignable (*a*). But a salary to become due under a contract of personal service is assignable (*b*).

The chose in action must be distinguished from a mere right to sue for damages for breach of a contract or for a tort; such a right is unassignable (*c*). So, too, a personal licence, *e.g.*, a licence to enter a house and seize goods cannot be assigned (*d*). But although a right of action cannot be assigned, an assignment of the right to the damages which may be recovered in an action, whether founded on contract or tort, may be made. In *Glegg* v. *Bromley* (*e*), Mrs. G. was plaintiff in two actions, in one of which she claimed damages for misrepresentation, and in the other of which she claimed damages for defamation. Being indebted to her husband, Mrs. G. assigned to him by way of security, in addition to the security he already held, the damages she might recover in the actions. Subsequently, the first action was dismissed with costs, but in the second action the plaintiff recovered £200. The defendant in the first action sought to attach by garnishee proceedings the £200, which sum the plaintiff's husband also claimed under his security. It was held by the Court of Appeal that the husband was entitled under his assignment. What was assigned was not a cause of action or mere expectancy, but property, being the fruits of an action as and when recovered. The law was stated by Parker, J. (sitting in the Court of Appeal) in this case: "I

(*y*) *Re Isaacson*, [1895] 1 Q. B. 333; but cf. *Jarvis* v. *J.*, 63 L. J. Ch. 10.

(*z*) *Tolhurst* v. *Assoc. Portland, etc.*, [1902] 2 K. B. at p. 668; *Kemp* v. *Baerselman*, [1906] 2 K. B. 604; *Public Trustee* v. *Elder*, [1926] Ch. 776, 791.

(*a*) *Hole* v. *Bradbury*, 12 Ch. D. 886; *Griffith* v. *Tower Publishing Co., etc.*, [1897] 1 Ch. 21; cf. *International Fibre Syndicate* v. *Dawson*, 84 L. T. 803.

(*b*) *Crouch* v. *Martin*, 2 Vern. 595; *Shaw & Co.* v. *Moss Empires, etc.*, 25 T. L. R. 190; *Russell & Co.* v. *Austin Fryers*, 25 T. L. R. 414.

(*c*) *May* v. *Lane*, 64 L. J. Q. B. 236; cf. *Torkington* v. *Magee*, [1902] 2 K. B. 427.

(*d*) *Re Davis & Co.*, 22 Q. B. D. 193.

(*e*) [1912] 3 K. B. 474.

think that according to the true construction of the mortgage, the subject-matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action. . . . Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity, whether legal or equitable. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name. There was one exception to this rule : equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, whether the bare right were legal or equitable. . . . It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was in the view of the Court property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass. . . . For every equitable assignment, however, there must be consideration. If there be no consideration, there can be no equitable assignment. This appears from *Tailby* v. *The Official Receiver*, 13 A. C. 523, and *Re Ellenborough*, [1903] 1 Ch. 697. The question whether there was consideration was argued. . . . The Master came to the conclusion that there was. . . . I see no reason to differ from this conclusion." In *German* v. *Yates* (*f*), the view was expressed by Lush, J., that the *dictum* of Parker, J., in *Glegg* v. *Bromley*, that "for every equitable assignment there must be considerations," only applied to an assignment of future property.

Floating charge.—In connection with the subject of equitable assignment mention may be made of floating charges which are equitable charges created by companies over their undertakings (*g*). "A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying conditions in which it happens to be from time to

(*f*) 32 T. L. R. 52.
(*g*) *Panama, etc., Mail Co.* (1870), L. R. 5 Ch. 318.

time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes. His right to intervene may be suspended by agreement. But if there is no agreement for suspension, he may exercise his right whenever he pleases after default" (*h*).

The charge is a subsisting one though not immediately effective until some prescribed event happens to call it into activity (*i*). It gives an immediate equitable charge on the assets subject to the right of the company in the ordinary course and for the purpose of the business of the company, but not otherwise, to dispose of the assets of the company as though the charge had not been created (*j*). In determining what matters are in the ordinary course of business, regard must be had to the objects of the company as defined in its memorandum of association (*k*). The company may sell any of its assets comprised in the security free from the charge (*l*), and may create specific mortgages, legal or equitable, ranking in priority to the floating charge (*m*), even where there is notice of the floating charge (*n*). A provision in the instrument creating the charge prohibiting the company from creating charges ranking in priority to the floating charge does not affect the priority of specific mortgagees without notice of the prohibition (*o*). Upon maturity, or prior to maturity if the security is in jeopardy (*p*), a receiver of the property comprised in the floating charge will be appointed. The holder of a floating security may issue his writ to enforce his security though the security has not matured and is not in jeopardy (*q*). Upon the appointment of a receiver or the liquidation of the company the charge loses its floating character and attaches to the property comprised in the charge (*r*).

(*h*) *Per* Lord Macnaghten; *Government Stock, etc., Co.* v. *Manila Ry. Co.*, [1897] A. C. at pp. 86 and 87.

(*i*) *Victoria Steamboats Co.*, [1897] 1 Ch. at p. 163.

(*j*) *Wallace* v. *Evershed*, [1899] 1 Ch. 891.

(*k*) See *Borax Co.*, [1901] 1 Ch. 326; *H. H. Vivian & Co.*, [1900] 2 Ch. 654.

(*l*) *Florence Land, etc., Co.* (1878), 10 Ch. D. 530; and see *Driver* v. *Broad*, [1893] 1 Q. B. 744.

(*m*) *Wheatley* v. *Silkstone Coal Co.* (1885), 29 Ch. D. 715; *Cox Moore* v. *Peruvian Corporation*, [1908] 1 Ch. 604; cf. *Murray* v. *Scott*, 9 A. C. 519.

(*n*) *Hamilton's Windsor Iron Works* (1879), 12 Ch. D. 707.

(*o*) *English, etc., Investment Co.* v. *Brunton*, [1892] 2 Q. B. 707; *Re Castell and Brown, Ltd.*, [1898] 1 Ch. 315; *Re Valletort Steam Laundry Co.*, [1903] 2 Ch. 654.

(*p*) *Victoria Steamboats Co., ubi supra.*

(*q*) *Re Carshalton, etc.*, [1908] 2 Ch. 62, distinguishing *Bonham* v. *Newcomb*, 1 Vern. 232.

(*r*) *Re Colonial Trusts, etc.*, 15 Ch. D. at p. 472.

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Mortgage by company of uncalled capital.—Where power to mortgage future or unpaid-up capital is given by the memorandum or articles of association a mortgage by a company of its future or uncalled capital is valid (*s*). A company has, however, no power to create any charge on that portion of its capital which can under section 59 of the Companies (Consolidation) Act, 1908, only be called up in the event of and for the purposes of the company being wound up (*t*).

3. What amounts to an Equitable Assignment.

No rule can be laid down as to the form requisite for a valid equitable assignment. In Lord Macnaghten's speech in *Brandts, etc.* v. *Dunlop & Co.* (*u*), he referred to the contention that the document relied upon in that case did not use the language of an assignment, and proceeded : "An equitable assignment does not always take that form. It may be addressed to the debtor. It may be couched in the language of command. It may be a courteous request. It may assume the form of mere permission. The language is immaterial if the meaning is plain. All that is necessary is that the debtor should be given to understand that the debt has been made over by the creditor to some third person. If the debtor ignores such a notice he does so at his peril." No writing is necessary (*x*), unless the agreement to be proved is within the Statute of Frauds (*y*), and any words which show an intention of transferring or appropriating the chose in action to or for the use of the assignee are sufficient (*z*), and give a good charge on the chose in action. "The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear." Whether consideration is requisite for the validity of

(*s*) *Re Pyle Works* (1890), 44 Ch. D. 535; *Newton* v. *Anglo-Australian, etc.*, [1895] A. C. 244; Buckley (10 ed.), p. 239.

(*t*) *Re Mayfair Property Co.*, [1898] 2 Ch. 28; *Re Irish Club Co.*, [1906] W. N. 127.

(*u*) [1905] A. C. p. 462.

(*x*) *Gurnell* v. *Garder*, 4 Giff. 626; *Riccard* v. *Prichard*, 1 Kay & J. 277, 279; cf. *Field* v. *Megaw*, L. R. 4 C. P. 660.

(*y*) *Ex p. Hall*, 10 Ch. D. 615, and cf. *Re Richardson*, 30 Ch. D. 396.

(*z*) *Row* v. *Dawson*, 1 Ves. Sen. 331; *Gorringe* v. *Irwell*, 34 Ch. D. p. 134. See also *Tailby* v. *Official Receiver* (1888), 13 A. C. p. 543; *Burn* v. *Carvalho*, 4 My. & C. 690; *Cook* v. *Black*, 1 Ha. 390; *M'Fadden* v. *Jenkyns*, 1 Ha. 458; *Malcolm* v. *Scott*, 3 Mac. & G. 29; *Myers* v. *The United, etc., Co.*, 7 De G. M. & G. 112; *Chowne* v. *Baylis*, 31 B. 351; *Ex p. Montagu*, 1 Ch. D. 554; *Ranken* v. *Alfaro*, 5 Ch. D. 786; *Re Irving*, 7 Ch. D. 419; *Brown & Co.* v. *Kough*, 29 Ch. D. 848; *Webb* v. *Smith*, 30 Ch. D. 192.

an equitable assignment cannot be said to be settled. The cases show that where the other requisites of a valid equitable assignment at present, consideration is not necessary for the equitable assignment of an existing chose in action (*b*). It has been held, however, on the ground that a " possibility " is not " property," that a mere possibility or expectancy is incapable of assignment unless there is consideration (*c*).

Although a mere contract as to after-acquired property may amount to an equitable assignment thereof, it must purport to confer an interest in the future chattels immediately by its own force, and without the necessity of any further act on the part of the assignee upon the future chattels coming into existence (*d*). No notice to the debtor of the assignment is necessary (*e*). Assignments of debts are not governed by the same rules as bills of exchange and promissory notes, so as to make it obligatory upon the assignee of a debt to give notice to the assignor of non-payment by the debtor (*f*). But the assignee of a debt in such a case (if the assignment is by way of security) is chargeable for wilful default, as every mortgagee must be (*g*).

Some Cases of Equitable Assignment.—An agreement between a debtor and a creditor that the debt owing shall be paid out of a *specific* fund coming to the debtor (*h*), or an order given by a debtor to his creditor upon a third person, having funds of the debtor, to pay the creditor out of such funds, will create a binding equitable assignment, and the consent of the party to whom the order is given is not necessary (*i*).

In *Brice* v. *Bannister* (*k*), G. agreed to build a vessel for

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(*b*) *Fortescue* v. *Barnett*, 3 M. & K. 36; *Kekewich* v. *Manning*, 1 De G. M. & G. 176; *Donaldson* v. *D.*, Kay, 711; *Harding* v. *H.*, 17 Q. B. D. 442; *Re Griffin*, [1899] 1 Ch. 408; *Re Patrick*, [1891] 1 Ch. 82; *Re Lucan*, 45 Ch. D. 470; *Re Westerton*, [1919] 2 Ch. 104; and see notes to *Ward* v. *Turner*, *infra*.

(*c*) *Re Ellenborough*, [1903] 1 Ch. 697; *Re Mudge*, [1914] 1 Ch. 115; and see *supra*, p. 103.

(*d*) *Reeve* v. *Whitmore*, 4 De G. J. & S. 1; *Brown* v. *Bateman*, L. R. 2 C. P. 272, 283, 284; and see *Re Davis & Co.*, 22 Q. B. D. 193, and (n.) " Covenants, etc.," p. 112.

(*e*) *Gorringe* v. *Irwell*, 34 Ch. D. 128.

(*f*) See *Glyn* v. *Hood*, 1 De G. F. & J. 334.

(*g*) *Per* Turner, L.J., *Glyn* v. *Hood*, 1 De G. F. & J. 349; see *Ex p. Mure*, 2 Cox, 63.

(*h*) *Rodick* v. *Gandell*, 1 De G. M. & G. 763.

(*i*) *Burn* v. *Carvalho*, 4 My. & Cr. 690; *Brown & Co.* v. *Kough*, 29 Ch. D. 848; *Palmer* v. *Carey*, [1926] A. C. 703.

(*k*) 3 Q. B. D. 569; and see *Durham* v. *Robertson*, [1898] 1 Q. B. at p. 773.

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defendant B., for a price payable in instalments : G. being indebted to the plaintiff Brice, ordered and requested the defendant to pay £100 to Brice out of moneys due or to become due to him, G. The plaintiff gave the defendant notice of this. At the time the order to pay was given all the instalments due had been paid to G. The defendant refused to be bound by the notice, and afterwards paid the accruing balance amounting to more than £100 to G. Held, a good equitable assignment, and that the plaintiff was accordingly entitled to recover £100 from defendant (*l*).

In *Percival* v. *Dunn* (*m*), it was held that a similar order not specifying the fund or debt out of which payment was to come was bad. D., the defendant, owed A., a builder, money, payable by instalments. A. gave the plaintiff P., to whom he owed money, an order on D., "Please pay P. the amount of his account £47," etc. At the time the order was given to defendant D., he was in debt to A. Held, it did not, for the above reason, operate as an equitable assignment (*n*).

In *Brandts, etc.* v. *Dunlop, etc.* (*o*), K. & Co., a firm of merchants, were financed by the plaintiffs under an arrangement whereby on a purchase of goods by K. & Co. approved of by the plaintiffs the latter provided funds to complete the purchase and took a delivery order of the goods to themselves. On K. & Co. finding a purchaser (also approved of), the plaintiffs released the goods and gave a delivery order to K. & Co., relying for repayment of their advance upon a written undertaking by K. & Co. in each case that the price should be paid direct to the plaintiffs, and that in the meantime K. & Co. would hold the goods and their proceeds in trust for them, and would grant them "the sole and absolute lien on the said goods and their proceeds" until they obtained full payment of their advance. Under this arrangement a parcel of goods was bought by K. & Co. and sold and delivered to the defendants. The plaintiffs sent a written notice to the defendants that K. & Co. had made over to the plaintiffs the right to receive the purchase-money, but the defendants paid the pur-

(*l*) Distinguishing *Tooth* v. *Hallett*, L. R. 4 Ch. 242; followed in *Ex p. Hall*, 10 Ch. D. 615; distinguished in *Western Waggon, etc., Co.* v. *West* (1892), 1 Ch. 271, p. 110, *infra;* not applied in *May* v. *Lane*, [1894] 64 L. J. Q. B. 236.

(*m*) 29 Ch. D. 128; *Re Gunsbourg*, 88 L. J. K. B. 479.

(*n*) And see *Diplock* v. *Hammond*, 5 De G. M. & G. 320; *Re Farrell*, 10 Ir. Ch. R. 304; *Harding* v. *H.*, 17 Q. B. D. 442; cf. *Webb* v. *Smith*, 30 Ch. D. p. 194.

(*o*) [1905] A. C. 454.

chase money to K. & Co. It was held by the House of Lords that the transactions between K. & Co. and the plaintiffs amounted to a valid equitable assignment, and that the defendants were liable to pay to the plaintiffs the sum claimed.

In *Ex p. Alderson* (*p*), R, being pressed to discharge a debt on August 5, 1813, gave to two creditors a draft on the executor of a debtor of hers, which draft the executor promised to discharge on receiving assets. A commission of bankruptcy issued against R on November 17, 1814. Upon a petition being presented by the two creditors, it was held, that they were entitled to the sum for which the draft was given, as against the assignees. And Lord Eldon on the appeal said, that the debtor would be bound by the order being shown to him, and that a contract on his part to pay was, in equity, not necessary (*q*).

A mere indorsement in blank of a debenture of a joint stock company has been held a good equitable assignment (*r*).

In *London & Yorkshire Bank* v. *White* (*s*), F, in conversation with the bank manager, agreed on December 7 to assign to the bank, as security for an overdraft, his interest in certain goods then deposited with G for sale. On December 9, F sent a notice to G that he had assigned his interest in the goods to the bank, and requesting G to pay the bank the proceeds of sales from time to time, etc. Held, that there was, by the oral agreement of December 7, a complete equitable assignment to the bank, that the notice to G on the 9th was not necessary to complete the title, and that the notice of the 9th was not a bill of sale (*t*).

In *Re Steel Wing Co., Ltd.* (*u*), the company being indebted

(*p*) 1 Madd. 53, affir, 3 Swans. 392.

(*q*) *Ex p. South* (1818), 3 Swans. p. 393; *Re Briggs & Co.*, [1906] 2 K. B. 209; *Marchant* v. *Morton*, [1901] 2 K. B. 829.

(*r*) *Re Pryce*, 4 Ch. D. 685; *Re Jenkinson*, 15 Q. B. D. 441. As to equitable charges on shares see *Colonial Bank* v. *Whinney*, 11 A. C. 426; *Bradford Banking Co.* v. *Briggs*, 12 A. C. 29; *Deverges* v. *Sandeman, Clarke & Co.*, [1902] 1 Ch. 579; *Bank of N. T. Butterfield* v. *Golinsky*, [1926] A. C. 733.

(*s*) 11 T. L. R. 570. Cf. *National Provincial Bank* v. *Lindsell*, [1922] 1 K. B. 21.

(*t*) *Manchester, Sheffield, etc., Ry.* v. *N. Central, etc., Co.*, 13 A. C. 554; *Newlove* v. *Shrewsbury*, 21 Q. B. D. 41.

(*u*) [1921] 1 Ch. 349. See also *Burn* v. *Carvalho*, 4 My. & C. 690; *Shand* v. *Du Buisson*, 18 Eq. 283; *Ex p. Montagu*, 1 Ch. D. 555; *Smith* v. *Everett*, 4 Bro. Ch. 64; *Ex p. Steward*, 3 Mont. D. & De G. 265; *Diplock* v. *Hammond*, 2 Sm. & G. 141; 5 De G. M. & G. 320; *L'Estrange* v. *L'E.*, 13 B. 281; *Riccard* v. *Pritchard*, 1 Kay & J. 277; *Jones* v. *Farrell*, 1 De G. & J. 208; *Ex p. Imbert*, 1 De G. & J. 152; *Farley* v. *Turner*, 26 L. J. Ch. 710; *Rayner* v. *Harford*, 27 L. J. Ch. 708; *Chowne* v. *Baylis*, 31 B. 351; *Langton* v. *Waring*, 18 C. B. (N.S.) 315; *Ex p. North Western Bank*, 15 Eq. 69; *Addison* v. *Cox*, L. R. 8 Ch. 82;

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to its managing director, one Pauling, he assigned, for valuable consideration, the amount due to him to Mooney, the assignment being made by a memorandum which, after setting out particulars showing a balance of £4,632 owing, proceeded, "and it is this balance that Mr. Pauling hereby transfers to Mr. Mooney." Mooney afterwards assigned a moiety of the debt to Lord. Written notice of both assignments was given to the company. The company having made default in payment, Lord presented a winding-up petition, claiming to be entitled so to do as creditor for £2,316. It was held that Lord was not a legal assignee, the assignment of part of a debt not being within section 25, sub-section 6 of the Judicature Act, 1873 (*x*), but that he was an equitable assignee and entitled to present the petition. A winding-up order was accordingly made.

Where no Equitable Assignment is Created.—The intention, however, to assign or to create a charge must be shown. Thus, a mere letter of instruction to a banker not written with any intent to create a charge on a fund in his hands, will not amount to an equitable assignment (*y*). "You can have no charge in equity without an intention to charge," said Jessel, M.R. (*z*). "The letter on which you rely was not written with any intent to charge the fund; it was a mere letter of instructions to the bankers." But cases where there is no intention to create any charge at all must be distinguished from cases where there is an agreement to create a charge by a later document which has not been in fact executed. In such cases the original agreement will create a charge in equity (*a*).

Where a person has a fund belonging to another in his hands, a bill of exchange drawn by the latter on the former, although for the exact amount, is not an equitable assignment thereof (*b*); for a bill of exchange differs essentially from an assignment. "An equitable assignment is not a negotiable instrument, and need not at all be free from the equities between the original parties to the

Ex p. Nicholls, re Jones, 22 Ch. D. 782; *Brown & Co.* v. *Kough*, 29 Ch. D. 848; *Manchester, Sheffield, etc., Ry.* v. *N. Central Wagon Co.*, 13 A. C. 554; *Forster* v. *Baker*, [1910] 2 K. B. 636. Cf. *Skipper, ib.*, 630.

(*x*) Now section 136 of Law of Property Act, 1925; cf. *ib.*, 630.

(*y*) *Hopkinson* v. *Forster*, 19 Eq. 74; *Schroeder* v. *Central Bank, etc.*, 34 L. T. 735; *Ratner* v. *Midland Bank*, 38 T. L. R. 253.

(*z*) 19 Eq., p. 75.

(*a*) See *Shears & Sons, Ltd.* v. *Jones*, [1922] 2 Ch. 802.

(*b*) *Shand* v. *Du Buisson*, 18 Eq. 283.

transaction." The same instrument could hardly operate at one and the same time both as a bill of exchange and as an equitable assignment (*c*). Nor is a cheque an equitable assignment. "A cheque," said Jessel, M.R., "is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's" (*d*).

Where the property purporting to be assigned is not vested in the assignor at the time of the assignment, and by some act intervening, such as bankruptcy, never becomes his, there is no equitable assignment. So also where the benefit of a contract is assigned which creates no debt present or future. Thus, in *Western Waggon, etc., Co.* v. *West* (*e*), P. assigned to the plaintiffs his right under a mortgage with defendant West to further advances which formed part of the consideration for such mortgage. The plaintiffs gave defendant notice of the assignment, but they, in forgetfulness, made a further advance of £500 to P. Held, that as the contract in the mortgage deed was not a contract to lend out of a particular fund, no money or fund was bound by it, and that no debt was created by it, and that the £500 was therefore never bound in the hands of the defendant W., although it would be in the hands of P. Also, that the plaintiffs could only sue for damages in right of P., and that P. had sustained none (*f*).

A mere mandate from a principal to his agent, not communicated to a third person, will give the third person no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or at least before any engagement is entered into with a third person to execute it for his benefit. And it will be revoked by any disposition of the property inconsistent with the execution of it (*g*). Where an order is given by a man to his bankers to pay over a sum to a third person to whom the order is not communicated, and the banker does not make the payment, and the order is afterwards countermanded, the third party cannot insist on the banker paying to him the money (*h*). So, where a landlord, being indebted to his bankers in the sum of £200, wrote

(*c*) See judgment of Fry, L.J., in *Brown, Shipley & Co.* v. *Kough*, 29 Ch. D. 875.

(*d*) *Hopkinson* v. *Forster*, 19 Eq. 74, commenting on *Knee* v. *Beard*, 8 C. B. (N.S.) 372.

(*e*) (1892) 1 Ch. 271.

(*f*) See also *May* v. *Lane*, 64 L. J. Q. B. 236; *Percival* v. *Dunn*, 29 Ch. D. 128.

(*g*) *Scott* v. *Porcher*, 3 Mer. 652, 664; *Malcolm* v. *Scott*, 3 Ha. 39; but cf. *Alexander* v. *Steinhardt*, [1903] 2 K. B. 208.

(*h*) *Morrell* v. *Wooten*, 16 B. 197; *Re Hamilton*, 124 L. T. 737.

a letter to his tenant requesting him when the next payment of rent became due to pay £200 to the bankers "to my credit for which I will accept their receipt as so much of your rent discharged," it was held that the letter amounted only to a revocable authority, and that the same was revoked by the landlord's bankruptcy (*i*). In *Re Russell* (*k*), A, entitled to the balance of an unpaid legacy in the hands of executors, wrote a letter at the request of B to his own solicitor, directing him to pay the balance to B. A's solicitor sent on the letter to the executors' solicitors, and the executors being informed of this letter, acted on it and paid the balance to B four days after A's death. The executors subsequently requested B (who was a trustee) to refund the money on the ground that their authority to pay was revoked. Held that the letter was merely a direction, and not an equitable assignment, and that it was revoked by A's death. In *Fitzgerald* v. *Stewart* (*l*), consignments had been made from abroad to answer an annuity which the owner of the property consigned was liable to pay, and the consignee in this country gave notice of the arrangement to the annuitant, and made payments in pursuance of it; it was held by Brougham, L.C., that the consignee was not afterwards at liberty to discontinue such payments, so long as he had any proceeds of the *consignments* in his hands.

In *Alexander* v. *Steinhardt* (*m*), merchants in America, being indebted to the plaintiff, consigned goods to agents in England, instructing them to sell the goods and pay plaintiff the balance of proceeds after payment of a specified sum to another creditor, and they wrote plaintiff advising him of what they had done. Before the letters reached England the merchants became bankrupt, and the Syndic in the bankruptcy telegraphed revoking the directions. Held, that upon posting of the letters in America, there was an equitable assignment of the proceeds to plaintiff, which was unaffected by the supervening bankruptcy.

A mere power of attorney or authority to a person to receive money not addressed to the debtor, and directing such person to pay it to a creditor of the party granting the power or authority, will not amount to an equitable assignment. Thus, in *Rodick* v. *Gandell* (*n*), a railway company was indebted to the defendant,

(*i*) *Ex p. Hall*, 10 Ch. D. 615.
(*k*) 37 Sol. Jo. 212; cf. *Lambe* v. *Orton*, 1 Dr. & Sm. 125.
(*l*) 2 Russ. & M. 457.
(*m*) [1903] 2 K. B. 208.
(*n*) 1 De G. M. & G. 763, at p. 778; 12 B. 325.

their engineer, who was greatly indebted to his bankers. The bankers having pressed for payment or security, the defendant, by letter to the *solicitors of the company*, authorised them to receive the money due to him from the company, and requested them to pay it to the bankers. The solicitors, by letter, promised the bankers to pay them such money on receiving it. It was held that this did not amount to an equitable assignment of the debt (*o*).

A mere representation, by the drawer, that bills of exchange will be met by the drawee, inasmuch as the drawee has larger funds in his hands belonging to the drawer, will not amount to an equitable assignment or specific appropriation of such funds (*p*).

A promise to pay money when the debtor receives a debt due to him from a third person does not constitute an equitable assignment, so as to charge the debt in the hands of such third person (*q*).

It seems that an order for payment, sent to the person to whom the payment is to be made, of a debt owing by a third person who is not under an obligation to apply the money as directed by the order, is liable to *ad valorem* conveyance duty if on sale or in consideration of any debt under section 57 of the Stamp Act, 1891, or if taking effect as a voluntary disposition *inter vivos*, to conveyance duty under section 74 of the Finance (1909—10) Act, 1910 (*r*).

Covenants as to after-acquired Property.—As before stated in considering whether a covenant of this nature operates as an equitable assignment of or charge upon the property comprised within the covenant, the question whether specific performance of the covenant would be granted is irrelevant. The question is whether definite ascertained property comprised within the words of the covenant has become legally vested in the covenantor; if it has, and if the covenant is no longer executory but executed in the sense that the consideration for the covenant has been furnished by the covenantee, the equitable assignment or charge

(*o*) See also *Bell* v. *The L. & N. W. Ry. Co.*, 15 B. 548; *Thayer* v. *Lister*, 30 L. J. Ch. 427; *Flint* v. *Walker*, 5 Moo. P. C. C. 179; *Re Foster*, 7 Ir. R. Eq. 294.

(*p*) See *Thomson* v. *Simpson*, L. R. 5 Ch. 659; *Citizen's Bank, etc.* v. *First National Bank, etc.*, L. R. 6 H. L. 352; *Brown, Shipley & Co.* v. *Kough*, 29 Ch. D. 848.

(*q*) *Field* v. *Megaw*, L. R. 4 C. P. 660; *Jones* v. *Starkey*, 16 Jur. 510.

(*r*) Alpe (17th ed.), p. 78.

is complete (*s*). Where the property comprised in the covenant is defined by reference to its character or the mode of acquisition by the covenantor in such manner that it can be easily identified, little difficulty has arisen in applying the principle. Thus where an incumbent charged his then benefice with an annuity and covenanted that if he were preferred to another benefice he would fully charge the same, and that in the meantime the same should be charged, and was subsequently preferred, it was held that there was a good equitable charge upon the new benefice so soon as it was acquired (*t*). Again, a covenant by the grantor of an annuity to charge it upon all such property as in the event of his surviving his wife he might become possessed of by virtue of his wife's will *or otherwise* was held to create a valid charge upon an annuity appointed in trust for the grantor by his wife's will (*u*).

Where, however, a person in terms assigns or covenants to settle or charge all after-acquired property the law cannot be said to be free from doubt. In *Re Reis* (*x*), following and applying Lord Eldon's judgment in *Lewis* v. *Madocks* (*y*), the Court of Appeal held that a covenant by the settlor in his marriage settlement to transfer all his after-acquired property (except business assets) to the trustees of the settlement was not too vague and general to be enforced by the Court. In *Re Mudge* (*z*), a marriage settlement contained a covenant that if during the coverture the wife, or the husband in her right, should "become seised or possessed of or entitled to any real or personal property of the value of £50 and upwards for any estate or interest whatsoever, in possession, reversion, remainder or expectancy," the same should be conveyed to the settlement trustees. At the date of the marriage the wife was entitled under the will of her mother to an expectancy as one of the possible next-of-kin of her sister, and such interest fell into possession after the coverture ended.

(*s*) *Metcalfe* v. *Abp. of York*, 1 My. & C. 547; *Tailby* v. *Official Receiver*, 13 A. C. 523, *per* Lord Macnaghten, at pp. 547 *et seq.*

(*t*) *Metcalfe* v. *Abp. of York*, *supra*. Such a covenant, unlawful when the action was brought, was lawful at the date of the covenant and the subsequent preferment.

(*u*) *Lyde* v. *Mynn*, 1 My. & K. 683.

(*x*) [1904] 2 K. B. 769; [1905] A. C. 442.

(*y*) 8 V. 150; 7 R. R. 10; *Hardey* v. *Green*, 12 B. 182; see also *Lyster* v. *Burroughs*, 1 Dr. & Wa. 149; *White* v. *Anderson*, 1 Ir. Ch. R. 419; *Stack* v. *Royse*, 12 Ir. Ch. R. 246.

(*z*) [1914] 1 Ch. 115.

It was held that this interest did not pass at law, and that the covenant relating to it was too vague to be enforced in equity. In *Re Clarke* (*a*), where a mortgagor had assigned certain existing property and all moneys to which he might during the security become entitled under any settlement, will, or other document, *and also* all real and personal estate (with certain exceptions) to which he should become entitled, the Court held that an interest to which the mortgagor subsequently became entitled under a will was included in the security, leaving open the effect of the last words in the assignment. In *Re Kelcey* (*b*) the validity of a memorandum of general charge for value upon all the *existing* property of the mortgagor was recognised and declared not to be against public policy.

Closely connected with the cases last discussed are those where a person has covenanted to settle lands of a certain value or to secure an annuity of a certain amount by a charge on lands which he may subsequently acquire. If, in such a case the covenantor does afterwards acquire lands, such lands, it would seem, are subject to a trust or lien to satisfy the covenant, and the covenantee is not restricted to an action for damages or specific performance (*c*). But where there was a covenant to secure an annuity by a certain date, "*either* by a charge on freehold estates to be situate in England or Wales, *or* by an investment of an adequate sum in some of the stocks or funds of Great Britain, *or* by the best means which might then be in his power," and the covenantor acquired property, it was held that the covenant did not create a charge (*d*).

4. Notice, Distringas, Stop Orders, etc.

Notice of an assignment is not necessary to render it perfect *as between the assignor and assignee*, whether it be for valuable consideration (*e*), or only voluntary (*f*). It does not render the

(*a*) 36 Ch. D. 348; and see *Re Lind*, [1915] 2 Ch. 345; *Re Dent*, [1923] 1 Ch. 113.

(*b*) [1899] 2 Ch. 530.

(*c*) *Wellesley* v. *W.*, 4 My. & Cr. 561; *Lyster* v. *Burrows*, 1 Dr. & W. 149; *Lewis* v. *Madocks*, 8 Ves. 150; 17 Ves. 48; and see *Re Lind*, [1915] 1 Ch. 744, 758; [1915] 2 Ch. 345, 357, 374.

(*d*) *Mornington* v. *Keane*, 2 De G. & J. 292.

(*e*) *Burn* v. *Carvalho*, 4 My. & C. 702; *Dufaur* v. *Professional L. A. Co.*, 25 B 599; *Rodick* v. *Gandell*, 1 De G. M. & G. 780; *Gorringe* v. *Irwell*, 34 Ch. D. 129.

(*f*) *Donaldson* v. *D.*, Kay, 711; *Roberts* v. *Lloyd*, 2 B. 376; *Re Way's T.*, 2 De G. J. & S. 365; *Re Patrick*, [1891] 1 Ch. 82; *Re Griffin*, [1899] 1 Ch. 408.

title perfect, for it was not even a step in the title before *Foster* v. *Cockerell* (*g*), and a written notice does not require registration as a bill of sale (*h*).

Nor is notice necessary as against third parties who stand in the same position as the assignor, as, for instance, persons claiming under a subsequent assignment as volunteers (*i*), a creditor under a judgment who has obtained a charging order (*k*), or as against a judgment creditor who has got a receiver appointed (*l*), or under a garnishee order (*m*), or the trustee in bankruptcy of the assignor who is only a statutory assignee of the bankrupt (*n*).

The neglect, however, to give notice, or to obtain what is equivalent thereto, a distringas, or a stop order, may have the effect, first, of rendering subsequent payments to the assignor valid; secondly, of enabling a subsequent purchaser or incumbrancer to gain priority by giving notice; thirdly, of bringing the subject-matter assigned within the operation of the reputed ownership clause of the Bankruptcy Act.

Neglect by assignee to give notice renders subsequent payment to assignor valid.—Where the assignee does not give notice of the assignment to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, he will be obliged to allow the payments which such debtor, trustee, or person subsequently makes to the assignor (*o*).

Priority, when gained by a subsequent purchaser or incumbrancer giving notice.—If the assignee of a chose in action, or a trust estate of personalty, does not perfect his title by giving notice of the assignment to the debtor or trustees, a subsequent purchaser or

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(*g*) 3 Cl. & Fin. 456. See judgment of Lord Macnaghten, *Ward* v. *Duncombe*, [1893] A. C., p. 392.

(*h*) *London, etc., Bank* v. *White*, 11 T. L. R. 520.

(*i*) *Justice* v. *Wynne*, 12 Ir. Ch. R. 289.

(*k*) *Eyre* v. *M'Dowell*, 9 H. L. Cas. 619, 642; *Scott* v. *Hastings*, 4 Kay & J. 633; *Brearcliffe* v. *Dorrington*, 4 De G. & Sm. 122.

(*l*) *Arden* v. *A.*, 29 Ch. D. 702; *Re the Marquis of Anglesey*, [1903] 2 Ch., p. 732.

(*m*) *Pickering* v. *The Ilfracombe Ry. Co.*, L. R. 3 C. P. 235; *Robinson* v. *Nesbitt*, *ibid.*, 264; *Glegg* v. *Bromley*, [1912] 3 K. B. 474; R. S. C., Order 45.

(*n*) *Re Wallis*, [1902] 1 K. B. 719; *Re Anderson*, [1911] 1 K. B. 903; *Re Irving*, 7 Ch. D. 419. See *infra*, p. 131.

(*o*) *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11; see *Re Lord Southampton*, 16 Ch. D. 178; *Bence* v. *Shearman*, [1898] 2 Ch. 582.

incumbrancer without notice at the date of his purchase or advance of the former assignment (*p*), even though subsequently and before giving notice he is made aware of the same (*q*) will, upon giving notice of his assignment, acquire priority; and it is of no importance, in the question of priority, whether the interest of the assignor be vested or contingent, present or reversionary. The leading case upon this subject is *Dearle* v. *Hall* (*r*), in which case Brown, being entitled for life to the yearly sum of £93, being the dividend arising from the moiety of a sum of money invested in the names of the executors of his father's will, by an indenture, dated December 19, 1808, assigned it to Dearle, to secure an annuity granted in consideration of £204; and by another indenture, dated September 26, 1809, he assigned the same yearly sum to Sherring, to secure an annuity granted in consideration of £150. No notice of the assignments was given by either Dearle or Sherring to the executors. By an indenture, dated March 20, 1812, Brown, in consideration of £711 3s. 6d., assigned the same annual sum absolutely to Hall, who, previous to making the purchase, called for every information respecting the fund and the title from the acting executor, and on April 25, 1812, served the executors *with a written notice* to pay him, as assignee of Brown, a moiety of the dividends of the fund during Brown's life, and they accordingly paid him a sum of money on account thereof. On October 17 following, the executors for the first time received notice of the assignments to Dearle and Sherring, and refused to make any more payments until the rights of the different parties should be ascertained. Plumer, M.R., after an elaborate consideration of the authorities, dismissed the bills filed by Dearle and Sherring, holding, that Hall had a better equity to the fund, and that the assignment to him, though posterior in date, was entitled in priority, in consequence of his having given, and of Dearle and Sherring having neglected to give, notice to the trustees.

"The question here," said Plumer, M.R., in that case, "is not which assignment is first in date, but whether there is not, on the part of Hall, *a better title to call for the legal estate*

(*p*) *Re Holmes*, 29 Ch. D. 786; and see *Warburton* v. *Hill*, Kay, 470; *Spencer* v. *Clarke*, 9 Ch. D. 137; *Newman* v. *N.*, 28 Ch. D. 674; *English, etc., Investment Co.* v. *Brunton*, [1892] 2 Q. B. 700; *Wilson* v. *Kelland*, [1910] 2 Ch. 306.

(*q*) See, *e.g.*, *Mutual Life A. S.* v. *Langley*, 32 Ch. D. 460, 468.

(*r*) (1823), 3 Russ. 1.

than Dearle or Sherring can set up; *or rather the question is, shall these plaintiffs now have equitable relief, to the injury of Hall?* What title have they shown to call on a Court of justice to interpose on their behalf, in order to obviate the consequences of their own misconduct? All that has happened is owing to their negligence, a negligence not accounted for, in forbearing to do what they ought to have done, what would have been attended with no difficulty, and what would have effectually prevented all the mischief which has followed. Is a plaintiff to be heard in a Court of equity, who asks its interposition in his behoof, to indemnify him against the effects of his own negligence, at the expense of another who has used all due diligence, and who, if he is to suffer loss, will suffer it by reason of the negligence of the very person who prays relief against him? The question here is, not as in *Evans* v. *Bicknell* (*s*), whether a Court of equity is to deprive the plaintiffs of any right,—whether it is to take from them, for instance, a legal estate, or to impose any charge upon them: it is simply, whether they are entitled to relief against their own negligence. They did not perfect their securities: a third party has innocently advanced his money, and has perfected his security, as far as the nature of the subject permitted him. Is this Court to interfere to postpone him to them? They say, that they were not bound to give notice to the trustees, for that notice does not form part of the necessary conveyance of an equitable interest. I admit, that, if you mean to rely on contract with the individual, you do not need to give notice; from the moment of the contract, he with whom you are dealing is personally bound. But if you mean to go further, and to *make your right attach upon the thing* which is the subject of the contract, it is necessary to give notice; and unless notice is given, you do not do that which is essential in all cases of transfer of personal property. The law of England has always been, that personal property passes by delivery of possession; and it is *possession* which determines the apparent ownership. If, therefore, an individual, who, in the way of purchase or mortgage, contracts with another for the transfer of his interest, does not divest the vendor or mortgagor of possession, but permits him to remain the ostensible owner as before, he must take the consequences which may ensue from such a mode of dealing. That doctrine was explained in *Ryall* v.

(*s*) 6 V. 174; 5 R. R. 245.

Rowles. . . . If you, having the right of possession, do not exercise that right, but leave another in actual possession, you enable that person to gain a false and delusive credit, and put it in his power to obtain money from innocent parties, on the hypothesis of his being the owner of that which in fact belongs to you. The principle has been long recognised even in Courts of law. In *Twyne's Case* (*t*), one of the badges of fraud was, that the possession had remained in the vendor. Possession must follow right; and if you, who have the right, do not take possession, you do not follow up the title, and are responsible for the consequences. . . . It is true that a chose in action does not admit of tangible actual possession, and that neither Brown nor any person claiming under him were entitled to possess themselves of the fund which yielded the £93 a-year. But, in *Ryall* v. *Rowles*, the Judges held, that, in the case of a chose in action, *you must do everything towards having possession which the subject admits;* you must do that which is tantamount to obtaining possession, by placing every person who has an equitable or legal interest in the matter under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is, for many purposes, tantamount to possession. If you omit to give that notice, you are guilty of the same degree and species of neglect (*u*) as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person.

"Is there the least doubt, that, if Brown had been a trader, all that was done by Dearle and Sherring would not have been in the least effectual against his assignees; but that, according to the doctrine of *Ryall* v. *Rowles*, his assignees would have taken the fund, because there was no notice to those in whom the legal interest was vested? In that case, it was the opinion of all the Judges, that he who contracts for a chose in action, and does not follow up his title by notice, gives personal credit to the individual with whom he deals. Notice, then, is necessary to perfect the title,—to give a complete right *in rem* (*x*), and not merely a right as against him who conveys his interest. If you

(*t*) 3 Rep. 80.

(*u*) Cf. *English, etc., Trust* v. *Brunton*, [1892] 2 Q. B. 1.

(*x*) But see the judgment of Lord Macnaghten, *Ward* v. *Duncombe*, [1893] A. C. 394.

are willing to trust the personal credit of the man, and are satisfied that he will make no improper use of the possession in which you will allow him to remain, notice is not necessary; for, against him, the title is perfect without notice. But if he, availing himself of the possession as a means of obtaining credit, induces third persons to purchase from him as the actual owner, and they part with their money before your pocket-conveyance is notified to them, you must be postponed. In being postponed, your security is not invalidated; you had priority, but that priority has not been followed up; and you have permitted another to acquire a better title to the legal possession. What was done by Dearle and Sherring did not exhaust the thing (to borrow the principle of the civil law), but left it still open to traffic. These are the principles on which I think it to be very old law, that possession, or what is tantamount to possession, is the criterion of perfect title to personal chattels, and that he who does not obtain such possession, must take his chance" (*y*).

The cases of *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*, were afterwards affirmed by Lyndhurst, L.C., upon appeal, who observed (*z*) that where personal property is assigned, delivery is necessary to complete the transaction, not as between the vendor and vendee, but as to third persons in order that they may not be deceived by apparent possession. * * * That in cases like the present, the act of giving the trustee notice was, in a certain degree, taking possession of the fund; that it was going as far towards equitable possession as it was possible to go; for, after notice given, the trustee of the fund becomes a trustee for the assignee who has given him notice.

In *Foster* v. *Cockerell* (*a*), M conveyed estates to trustees, on trust to sell and pay creditors of B, and subject thereto on trust for M for life, remainder to B in fee. M died and B granted annuities charged on the estate, and then mortgaged the estate without notice of them. The trustees sold the estate, and the mortgagees, who had not made any inquiries of the trustees, gave notice to them of the mortgage five years after it was created, and it was held that they had priority over the annuitants by reason of such notice. "This case unquestionably lays down that the

(*y*) See also *Loveridge* v. *Cooper*, 3 Russ. 30; *Re Richards*, 45 Ch. D., p. 595.
(*z*) 3 Russ. 58.
(*a*) 3 Cl. & Fin. 456.

rule in *Dearle* v. *Hall* is independent of any consideration of the conduct of the competing assignees, where the assignee second in date, has no notice of the earlier assignment. Priority in such cases depends simply and solely on priority of notice" (*b*). And a second assignee giving first notice of his assignment will be equally entitled to priority when he has taken such assignment from the legal personal representative of the *cestui que trust* who made the assignment to a first assignee (*c*).

In *Ward* v. *Duncombe* (*d*), M W was entitled in remainder under a will to a share of a fund in the hands of S and E as trustees thereof. M W married H D and settled her share, reserving a life interest. S had notice of this settlement; E, the other trustee, had not. M D and her husband proposed to mortgage her share as unencumbered. The intending mortgagees applied for information to the trustees S and E. S gave an evasive answer, but was not pressed further; E stated, with truth, that he had not received notice of any incumbrance. The mortgage being completed, formal notice was sent to both trustees. E acknowledged the notice, S did not. Then S died, without having informed E of the settlement. E therefore, the sole trustee of the will, had notice of the mortgage, but not of the settlement. Then one Evitt was appointed trustee of the will in place of S deceased, and together with E. Held, affirming Stirling, J., and the C. A. (*e*), that the trustees of the settlement were entitled in priority to the mortgagees, for the death of S could not deprive the trustees of the settlement of the priority which they had already acquired during his life. In *Ward* v. *Duncombe* all the principal cases relating to the effect of notice on the equitable assignment of a chose in action were thoroughly examined, and the foundation and scope of the doctrine laid down in *Dearle* v. *Hall* considered. The result seems to be that if one of the trustees of a fund has knowledge of an incumbrance affecting it, such knowledge amounts to express notice, and will enure for the benefit

(*b*) *Per* Lord Macnaghten, *Ward* v. *Duncombe*, [1893] A. C. p. 390; and see *Smith* v. *S.*, 2 Cr. & M. 231; *Meux* v. *Bell*, 1 Ha. 73; *Etty* v. *Bridges*, 2 Y. & C. C. C. 486; *Warburton* v. *Hill*, Kay, 470; *Stocks* v. *Dobson*, 4 De G. M. & G. 11; *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *Dunster* v. *Glengall*, 3 Ir. Ch. R. 47; *Re Wasdale*, [1899] 1 Ch. 163; *Re Lake*, [1903] 1 K. B. 151; *Re Dallas*, [1904] 2 Ch. 385; *Ipswich Permanent Money Club* v. *Arthy*, [1920] 2 Ch. 257.

(*c*) *Re Freshfield's T.*, 11 Ch. D. 198. Followed in *Montefiore* v. *Guedalla*, [1903] 2 Ch. 26.

(*d*) [1893] A. C. 369.

(*e*) See *Re Wyatt*, [1892] 1 Ch. 188.

of such incumbrancer, and a subsequent incumbrance made whilst one of the trustees has such knowledge, cannot gain priority over it by the fact that the subsequent incumbrancer has given notice to any or all of the trustees. But if such trustee died or resigned, and then a further incumbrance was made and notice given to the existing trustees, none of whom had knowledge of any prior incumbrance, then, *quære* (*f*).

The principle on which the rule in *Dearle* v. *Hall* was founded ought not to be extended (*g*). Where an assignee of a chose in action has given notice of such assignment to the debtor and subsequently executes a declaration of trust in favour of third parties, it is not necessary in order that the beneficiaries should retain their priority that notice should be given to the debtor of the execution of the declaration of trust (*h*).

The rule in *Dearle* v. *Hall* applies to all equitable interests in personal estate and choses in action, but prior to the Law of Property Act, 1925, the rule had no application to real or leasehold estate (*i*).

Section 137, sub-section 1 of the Law of Property Act, 1925, however, provides that the law applicable to dealings with equitable things in action which regulates the priority of competing interests therein, shall, as respects dealings with equitable interests in land, capital money, and securities representing capital money effected after the commencement of this Act, apply to and regulate the priority of competing interests therein; and this provision extends to capital money and securities in Court. But nothing in the section affects any priority acquired before the commencement of the Act (sub-s. 7).

Trustees of a fund are not under any legal obligation to answer inquiries put to them by intending incumbrancers as to existing incumbrances (*k*), and if they decline to do so the intending incumbrancer proceeds at his own risk (*l*).

(*f*) See *per* Lord Macnaghten in *Ward* v. *Duncombe*, [1893] A. C., at pp. 394, 395, doubting *Timson* v. *Ramsbottom*, 2 Keen, 35.

(*g*) See *Ward* v. *Duncombe*, [1893] A. C., at p. 394; *Hill* v. *Peters*, [1918] 2 Ch. 273.

(*h*) *Hill* v. *Peters*, *supra*

(*i*) *Hopkins* v. *Hemsworth*, [1898] 2 Ch. 347; *Re Richards*, 45 Ch. D., p. 596.

(*k*) *Low* v. *Bouverie*, [1891] 3 Ch. 82, 99; *Porter* v. *Moore*, [1904] 2 Ch. 367. See as to obligation to the *cestui que trust*, *Re Tillott*, [1892] 1 Ch., p. 88.

(*l*) *Per* Herschell, L.C., *Ward* v. *Duncombe*, [1893] A. C., p. 383.

How and to whom Notice should be given.

How Notice should be given.—The principle is best stated in Lord Cairns's words (*m*) : " If it can be shown that in any way the trustee has got knowledge of that kind—knowledge which would operate upon the mind of any rational man, or man of business, and make him act with reference to the knowledge he has so acquired—then I think the end is attained, and that there has been fixed upon the conscience of the trustee, and through that upon the trust fund, a security against its being parted with in any way that would be inconsistent with the incumbrance which has been created."

It was not necessary prior to the law of Property Act, 1925, that a notice to a trustee or debtor should be in writing; a verbal informal notice was sufficient, provided the fact of the assignment was distinctly and clearly brought to the mind and attention of the trustee (*n*). But by section 137, sub-section 3 of the Law of Property Act, 1925, it is provided that " A notice, otherwise than in writing, given to, or received by, a trustee after the commencement of this Act as respects any dealing with an equitable interest in real or personal property, shall not affect the priority of competing claims of purchasers in that equitable interest." And by the definition clause in the Act, the term " purchaser " includes a mortgagee or other person who for valuable consideration acquires an interest in property.

Although notices should be given either by the assignee himself, or some agent for him, it is sufficient if the trustee or debtor has received *aliunde* such notice as a reasonable man in the ordinary course of business would act upon (*o*).

To whom Notice should be given.—Notice of an assignment or charge upon a fund must be given to the trustees for the assignor or incumbrancer—to those whose duty it then is or will become to account for the fund to the assignor (*p*). Accordingly, when funds assigned are affected by successive trusts, notice of an

(*m*) *Lloyd* v. *Banks*, L. R. 3 Ch., at p. 491; and see *Ipswich Permanent Money Club* v. *Arthy*, [1920] 2 Ch. 257, 268.

(*n*) *Browne* v. *Savage*, 4 Dr. 640; *North British I. Co.* v. *Hallett*, 7 Jur. (N.S.) 1263; *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *Smith* v. *S.*, 2 Cr. & M. 231.

(*o*) *Lloyd* v. *Banks*, L. R. 3 Ch. 488; *Ipswich Permanent Money Club* v. *Arthy*, [1920] 2 Ch. 257.

(*p*) *Re Dallas*, [1904] 2 Ch. 385.

assignment, in order to be effectual, should be given to the trustees *for the assignor*, *i.e.*, to the immediate trustees of the *cestui que trust* assigning, and not to the trustees of the original settlement, although the latter may have the actual control of the funds (*q*).

In *Re Dallas* (*r*), A, having a mere expectancy as a legatee under the will of his father then living, charged his expectancy, first, in favour of B and then of C, and on the death of his father, and being named executor in his father's will, renounced probate. D then took out administration, and C immediately gave notice of his charge to D; B subsequently becoming aware of the grant of administration to D, also gave notice to him. It was held that C had priority.

In the *Ipswich Permanent Money Club* v. *Arthy* (*s*), it was held that where a person, before being appointed trustee, acquires knowledge of an incumbrance on the trust estate in such a way that as a reasonable man he would on his appointment act, in the execution of the trust, upon the information so acquired, and such knowledge continues to operate on his mind after his appointment, notice given to him after his appointment by a subsequent incumbrancer will not displace the priority of the earlier incumbrancer.

Notice to one of several co-trustees is sufficient to give priority as against a subsequent incumbrancer or assignee who gives notice to all the trustees (*t*).

But it is advisable that notice be given to all the trustees of the fund in existence at the date of the assignment or incumbrance; for if notice be given only to one of several trustees, priority may be lost as against a subsequent assignee who takes his assignment after the death of the trustee to whom the first assignee gave notice (*u*). If notice is given to all the trustees, the priority thus acquired is unaffected by the fact that on a complete change of trustees following, a subsequent incumbrancer gives notice of his charge to the new trustees, who had no notice of the prior assignment or charge (*x*).

(*q*) *Stephens* v. *Green*, [1895] 2 Ch. 148; see section 137, sub-section 2, of the Law of Property Act, 1925, cited *infra*, p. 127.

(*r*) [1904] 2 Ch. 385.

(*s*) [1920] 2 Ch. 257.

(*t*) *Ward* v. *Duncombe*, *supra*.

(*u*) *Timson* v. *Ramsbottom*, 2 Ke. 35; *Re Wasdale*, [1899] 1 Ch., p. 165.

(*x*) *Re Wasdale*, [1899] 1 Ch. 163; distinguishing *Timson* v. *Ramsbottom*, 2 Keen, 35; *Re Hall*, 7 L. R. Ir. 180.

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Where notice is not given to all the trustees it is extremely difficult to reconcile the authorities with any principle. Notice to one of several trustees is, it is said, notice to all, and is sufficient to give priority whilst the trusteeship remains unchanged as against a subsequent incumbrancer giving notice to all (*y*). Priority so acquired by notice to one only of two trustees was held in *Ward* v. *Duncombe* (*y*) to be retained, despite the death of the trustee having notice as against a subsequent incumbrancer who had made an advance and given notice of his incumbrance to both trustees during the life of the trustees having notice. But in *Timson* v. *Ramsbottom* (*z*), it was held that such priority was not retained as against an incumbrancer making his advance and giving notice of his incumbrance *after* the death of the trustee having notice (*a*). In view, however, of Lord Macnaghten's judgment in *Ward* v. *Duncombe*, *Timson* v. *Ramsbottom*, 2 Ke. 35, would appear to be of doubtful authority.

Further, new trustees of a settlement are not affected with notice of an assignment of the funds comprised in the settlement given to their predecessors, nor are they bound to inquire from them whether they have received notice of any incumbrance, and it has never been the practice of the Court of Chancery on appointing new trustees of funds to make such an inquiry (*b*). Hence if notice be given to all the trustees who afterwards die or retire, and new trustees are appointed, such trustees will not incur any liability if they distribute the trust funds before receiving any notice.

It follows, therefore, that assignees are not perfectly secure even when they give notice to all the trustees though they are against subsequent incumbrancers; but if they wish to be so they should repeat their notice when new trustees are appointed, or have notice of their assignment endorsed on the original deed (*c*).

Although as a general rule notice to one of several trustees is, with the limitations before mentioned, sufficient, yet where such one of the trustees is also a beneficiary, and assigns his beneficial interest in the trust fund to a stranger, the notice acquired by

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(*y*) *Ward* v. *Duncombe*, *supra*.

(*z*) 2 Keen, 35; followed in *Re Phillips*, [1903] 1 Ch. 183.

(*a*) See also *Re Hall*, 7 L. R. Ir. 180; and see Lord Herschell's observations in *Ward* v. *Duncombe*, [1893] A. C., pp. 381 and 382.

(*b*) *Phipps* v. *Lovegrove*, 16 Eq. 80.

(*c*) P. 134; *Phipps* v. *Lovegrove*, *supra*; *London Chartered Bank*, *etc.* v. *Lemprière*, L. R. 4 P. C. 572.

such trustee as assignor will not constitute notice to the trustees so as to prevail over a subsequent incumbrancer who gives notice to all the trustees, it being the interest of such trustee as assignor to conceal the assignment from subsequent intending incumbrancers (*d*). But where one trustee assigns his beneficial interest to another of his co-trustees, the notice which that co-trustee acquires as assignee constitutes during his life notice to the trustees, it not being his interest as assignee to conceal the assignment, and therefore it will prevail over subsequent incumbrancers with notice (*e*).

If the trustee himself advances money to a beneficiary and takes an equitable assignment he will have priority over a prior incumbrance of which he had no notice when he made his advance (*f*), and will also be entitled to priority over a subsequent incumbrancer giving notice (*g*).

A trustee who receives notice of an assignment of the trust fund made by the *cestui que trust*, is not, it seems, in the absence of inquiry, bound to inform the person giving him the notice, that he himself has a prior assignment, and by omitting to give that information the trustee will not lose his priority. *Secus*, if he had held out any inducement to such person to advance his money (*h*).

By section 137, sub-section 8 of the Law of Property Act, 1925, it is provided that where a notice in writing of an equitable interest in real or personal property has been served on a trustee under that section, the trustees from time to time of the property affected shall be entitled to the custody of the notice, and the notice shall be delivered to them by any person who for the time being may have the custody thereof; and subject to the payment of costs, any person interested in the equitable interest may require production of the notice.

Although notice should be given as early as possible, it is

(*d*) *Browne* v. *Savage*, 4 Drew. 635; *Lloyds Bank* v. *Pearson*, [1901] 1 Ch. 865; cf. *Re Dallas*, [1904] 2 Ch. 385.

(*e*) *Browne* v. *Savage*, *supra*; *Willes* v. *Greenhill* (*No.* 1), 29 B. 376, 391; *Re Dallas*, [1904] 2 Ch. 385. But see *Ex p. Stewart*, 4 De G. J. & Sm. 543; *Ex p. Smyth*, 3 Mont. D. & De G. 687; *Ex p. Boulton*, 1 De G. & J. 163.

(*f*) *Phipps* v. *Lovegrove*, *supra*; but cf. *Re Wasdale*, *supra*; *Newman* v. *N.*, 28 Ch. D. 678; and see *The Commissioners, etc.*, v. *Harby*, 23 B. 508.

(*g*) *Elder* v. *Maclean*, 5 W. R. 447; see *Mutual Life A. S.* v. *Langley*, 32 Ch. D. 460; *Assignees of Dunne* v. *Hibernian, etc., Co.*, 2 Ir. R. Eq. 82.

(*h*) See the observations of the Court in *Re Lewer*, 5 Ch. D., pp. 63—65.

sufficient if it be given before another notice (*i*). A purchaser, moreover, from an assignee of a reversionary fund who has given no notice cannot object to the title, unless he can show some intermediate incumbrance, but the vendor ought to point out to him who have been the trustees from time to time, in order to enable the purchaser to ascertain whether there have or have not been any intermediate incumbrances (*k*). If, however, evidence as to the persons who have been trustees is not produced, the title will be bad (*l*); but time may be given to produce sufficient evidence, if the vendor thinks he can procure it (*m*).

A general notice of a charge without specifying the amount will be sufficient (*n*), and a mere mistake in the description of the fund, if there is no doubt as to its being intended, will not render the notice void as against a subsequent purchaser. But the Court will not allow a former assignment to stand as a security against a subsequent purchaser beyond the sum mentioned in the notice (*o*); and if two charges on a chose in action are contained in one deed, and a notice is given to the trustees which specifies one only; the trustees not having constructive notice of the contents of the deed, notice of both the charges is not to be imputed to them (*p*).

Where stock standing in the names of trustees has been given as a specific legacy, and no assent has been given to it by the executor, notice to one of the trustees, not being an executor, is not sufficient to vest in the parties claiming by assignment from the legatee, that equitable possession of the fund which is required in order to postpone a subsequent incumbrancer, who has taken the precaution of giving such notice to the executor (*q*).

Where notices of assignments are simultaneous, the assignments will take priority according to their dates (*r*).

In *Buller* v. *Plunkett* (*s*), an officer in the army covenanted to assign to the trustees of a settlement any moneys which he might

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(*i*) *Meux* v. *Bell*, 1 Ha. 86; *Stocks* v. *Dobson*, 4 De G. M. & G. 17; *Browne* v. *Savage*, *supra*.

(*k*) *Hobson* v. *Bell*, 2 B. 17.

(*l*) *Ibid.*, p. 24.

(*m*) *Ibid.*, p. 25.

(*n*) *Re Bright's T.*, 21 B. 430, at p. 434; *Hutchinson* v. *Heyworth*, 9 A. & E. 375.

(*o*) *Woodburn* v. *Grant*, 22 B. 483; and see *Re Bright's T.*, 21 B. 430.

(*p*) *Re Bright's T.*, *supra*.

(*q*) *Holt* v. *Dewell*, 4 Ha. 447, followed in *Stephens* v. *Green*, [1895] 2 Ch. 148.

(*r*) *Calisher* v. *Forbes*, L. R. 7 Ch. 109; *Johnstone* v. *Cox*, 16 Ch. D. 571.

(*s*) 1 John. & H. 441.

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receive from the sale of his commission, and subsequently executed a second covenant to assign the same proceeds to another person who had no notice of the settlement. The second assignee gave the first notice to the army agent of the regiment, but the trustees also gave notice, both notices being given before the fund reached the army agent's hands. It was held by Page Wood, V.-C., that the trustees of the settlement had priority (*t*). Where an officer retired from Her Majesty's service, the amount in respect of his commission to which he was entitled under 34 & 35 Vict. c. 86, s. 3, "upon his retirement," though it had been previously lodged by the Commissioners with the army agents, and by them entered in their books under the officer's name, was not money of the officer so as to be capable of being affected by notice from an incumbrancer to the army agents until the retirement was gazetted (*u*). These cases arising out of sales of commissions, when they come to be examined, turn upon the fact that the notice was given to a mere possible agent before he was an actual agent—before the time at which he was in any sense liable to make payment, neither being himself a debtor, nor at that time charged with the duty of paying the money in question (*x*).

By the Law of Property Act, 1925, s. 137, sub-s. 2, it is provided that in the case of a dealing with an equitable interest in settled land, capital money or securities representing capital money, the persons to be served with notice of the dealing shall be the trustees of the settlement; and where the equitable interest is created by a derivative or subsidiary settlement, the persons to be served with notice are to be the trustees of that settlement. In the case of a dealing with an equitable interest in the proceeds of sale of land, the persons to be served with notice are to be the trustees for sale. In any other case (excepting where money or securities representing real estate are in Court) the person to be served with notice of a dealing with an equitable interest in land is to be the estate owner (*y*) of the land affected. The persons on whom notice is served pursuant to this sub-section are to be affected thereby in the same manner as if they had been

(*t*) See *Webster* v. *W.*, 31 B. 393; *Somerset* v. *Cox*, 33 B. 634; *Yates* v. *Cox*, 17 W. R. 20. See, however, *Ipswich Permanent Money Club* v. *Arthy*, [1920] 2 Ch. 257, 270.

(*u*) *Johnstone* v. *Cox*, 19 Ch. D. 17, and see *Roxburghe* v. *Cox*, 17 Ch. D. 520.

(*x*) *See Addison* v. *Cox*, L. R. 8 Ch. 79.

(*y*) See definition of "estate owner," section 205, sub-section 1 (v) of L. P. A., 1925.

trustees of personal property out of which the equitable interest was created or arose.

By sub-section 4 of section 137 of the Law of Property Act, 1925, it is provided that where, as respects any dealing with an equitable interest in real or personal property—(a) the trustees are not persons to whom a valid notice of the dealing can be given, or (b) there are no trustees to whom a notice can be given, or (c) for any other reason a valid notice cannot be served without unreasonable cost or delay, a purchaser may at his own cost require that a memorandum of the dealing be endorsed on the instrument creating the trust, and that the instrument be produced to him by the person having possession or custody to prove that a sufficient memorandum has been placed thereon or annexed thereto. Such memorandum is to operate, as respects priorities, in like manner as if notice of the dealing had been given to trustees qualified to receive the notice at the time when the memorandum is placed on or annexed to the instrument.

Where a person lends money on the security of a life policy which is not handed over, he has, if the policy is with a prior mortgagee, constructive notice of such mortgagee's title, and he cannot obtain priority by giving notice to the assurers (*z*). On the other hand, a second mortgagee of a life policy is not under an obligation to give notice of his mortgage to a first mortgagee of whose security he is aware, and if the first mortgagee makes further advances to the mortgagor, he has, *prima facie*, no priority in respect of the same over the second mortgagee who has given notice (*a*). But where the original mortgage provides for further advances being made and the first mortgagee when he makes the same has no notice of the subsequent mortgage, he will, it seems, have priority in respect of such further advances (*b*).

Notice to Solicitors.—Notice of an assignment to the solicitors of trustees (*c*) will be sufficient only if they are actually, either expressly or impliedly, authorised as agents to receive such notices (*d*).

(*z*) Re *Weniger's Policy*, [1910] 2 Ch. 291.

(*a*) *Ibid.* (*b*) [1910] 2 Ch. 291, 295.

(*c*) *Rickards* v. *Gledstanes*, 3 Gif. 298; 5 L. T. 568; *Willes* v. *Greenhill*, 29 B. 392.

(*d*) *Saffron Walden, etc., Building Society* v. *Rayner*, 14 Ch. D. 406, 410; and see *Re Russell's Policy T.*, 15 Eq. 26; *Arden* v. *A.*, 29 Ch. D. 702; *Re Cousin's T.*, 31 Ch. D. 671; *Re Hall & Co.*, 37 Ch. D. 712; *Tate* v. *Hyslop*, 15 Q. B. D. 368; *Re Frewen*, 60 L. T. 953.

Ryall v. Rowles.

Notice to Companies, etc.—Section 27 of the Companies (Consolidation) Act, 1908 (re-enacting section 30 of the Companies Act, 1862), provides that no notice of any trust, express, implied, or constructive, shall be entered in the register of companies registered in England or Ireland. Under this section persons claiming equitable interests in shares held by a registered holder cannot by giving the company notice of their claims impose the obligations of a trustee upon the company, nor affect the priority of their claims (*e*).

Nevertheless on the registration of a transfer of shares being claimed, notice to the company of competing equitable claims does affect its legal position. Where all conditions giving a transferee "a present absolute unconditional right to have the transfer registered" (*f*) have been performed, the company is not bound to refuse to register the transfer on the ground that it has notice of prior equitable claims of a third person. If, however, the claim of a transferee to registration is incomplete, *e.g.*, through some defect in the instrument of transfer, or the absence of the share certificate, and the company have notice of a prior adverse equitable claim, the company will be entitled (*g*), and may possibly (*h*) be bound, to refuse registration. Where the company refuses registration to an applicant having no legal right to demand it, no priority is gained through his application or notice, and the priority of conflicting equitable claims will be determined by the order of time in which they arose (*i*).

The section has no application where a conflict exists between the company and a third person, each claiming interests in shares of the company then legally vested in a registered shareholder of that company. The equitable doctrine of notice with all its consequences will then be applied against the company. So a company having under its articles a lien upon shares for all debts due from the holder thereof, cannot claim that under its lien it has priority over an equitable mortgagee of shares for debts incurred to it by the holder of those shares *after notice* of the mortgage (*k*). So,

(*e*) *Société Générale, etc.* v. *Walker*, 11 A. C. 20; and see *Grundy* v. *Briggs*, [1910] 1 Ch. 444, Buckley (10th ed.), pp. 75 and 587.

(*f*) 11 A. C., p. 29.

(*g*) *Société Générale, etc.* v. *Walker, supra; Roots* v. *Williamson*, 38 Ch. D. 485; *Moore* v. *N. W. Bank*, [1891] 2 Ch. 599; *Ireland* v. *Hart*, [1902] 1 Ch. 522.

(*h*) See *per* Lord Selborne, 11 A. C., at p. 29.

(*i*) See cases cited under (*g*), *supra.*

(*k*) *Bradford Banking Co.* v. *Briggs & Co.*, 12 A. C. 29, applying *Hopkinson* v. *Rolt*, 9 H. L. Cas. 514; and see *Mackereth* v. *Wigan Coal, etc., Co.*, [1916] 2 Ch. 293; *Bank of N. T. Butterfield* v. *Golinsky*, [1926] A. C. 733.

again, where on a transfer of shares the consideration therefor was received by the company in repayment of a loan previously made by the company to the transferor (the registered holder), it was held that as the company at the time it received the price had notice that the shares had been charged by the holder in favour of a third person, it was bound *ex aequo et bono* to account to him for the amount of the consideration (*l*).

Distringas.—Where, by reason of the death of the person in whose name stock was standing, without legal representatives, there was no trustee to whom notice could be given, it was held, by Knight-Bruce, V.-C., that a second incumbrancer, without notice of the first, by serving a notice of *distringas* on the Bank of England thereby obtained priority (*m*).

Under the Rules of the Supreme Court, 1883, Order XLVI, no writ of *distringas* is to be issued, but service of an affidavit and of the duplicate of the filed notice upon the Bank of England or any public company is to have the same effect as a writ of *distringas* formerly had.

Stop Orders.—Where a fund is not in the hands of trustees but in Court, then a person taking an assignment of it should obtain a *stop order*, otherwise a subsequent assignee who, at the time of his advance, had no notice of a first incumbrance, will gain priority by obtaining the first stop order, although the person taking the first assignment be a trustee of the fund (*n*); or, although another assignee, after payment of the fund into Court, has given notice to the trustees prior, in point of date, to the stop order (*o*).

When an assignment is made of an interest in a trust fund, part of which is in Court and part in the hands of the trustees, the assignee, in order to complete his title, must, as regards the fund in Court, obtain a stop order, and as regards the fund in the hands of the trustees, give notice to the trustees. Notice to the trustees will be ineffectual as regards the fund in Court, and as to that fund the priorities of different assignees will be determined by the dates at which they have obtained stop orders. An assignee who has obtained a stop order is entitled (as regards the fund in Court) to

(*l*) *Rainford* v. *Keith, etc., Co.*, [1905] 2 Ch. 147; *Mackereth* v. *Wigan Coal, etc., Co., supra*: Buckley (10th ed.), p. 587.

(*m*) *Etty* v. *Bridges*, 2 Y. & C. C. C. 486.

(*n*) *Elder* v. *Maclean*, 5 W. R. 447.

(*o*) *Pinnock* v. *Bailey*, 23 Ch. D. 497, 498.

priority over a prior assignee (of whose assignment he had no notice at the date of his advance), who had given notice to the trustees after the payment into Court but before the date of the stop order, but who had not himself obtained any stop order (*p*).

If a receivership order is obtained by way of equitable execution by a judgment creditor over a fund partly in Court and partly in the hands of an executor having notice of the order, then, even though it may be impossible to take the fund in execution, still a subsequent incumbrancer cannot get priority by a stop order (*q*).

An incumbrancer who has given notice to the trustees before payment into Court will not be postponed to a subsequent incumbrancer who first obtains a stop order (*r*). The order should be left at the Paymaster-General's office (*s*).

Bankruptcy.—(1) *Reputed Ownership.* When *Dearle* v. *Hall* (*supra*, p. 116), was decided, the law relating to reputed ownership in bankruptcy extended to all choses in action. It does not now apply to any choses in action (*t*), except "to debts due or growing due to the bankrupt in the course of his trade or business" (*u*). In order, therefore, to divest the bankrupt of his reputed ownership of debts due to him, in the course of his trade or business, the person to whom he has assigned them must have done everything that is equivalent to a delivery of chattels personal—that is, he must obtain an assignment and delivery of the security, if any, and give notice to the debtor of the assignment (*x*) before the commencement of the bankruptcy. The only person to whom notice of the assignment need be given is the party from whom the assignor is to receive the payment of his money, and not the original debtor (*y*).

And notice to the debtors is equally necessary, where debts are assigned by a retiring partner to a partner continuing in the

(*p*) *Mutual L. A. S.* v. *Langley*, 26 Ch. D. 686; 32 Ch. D. 460; cf. *Lister* v. *Tidd*, 4 Eq. 462; *Re Dallas*, [1904] 2 Ch. 403, 404.

(*q*) *Re Anglesey*, [1903] 2 Ch. 727; and see *Ideal Bedding Co.* v. *Holland*, [1907] 2 Ch., p. 170.

(*r*) *Livesey* v. *Harding*, 23 B. 141; *Brearcliffe* v. *Dorrington*, 4 De G. & Sm. 122.

(*s*) *Waller* v. *Wildridge*, 3 Ir. Ch. R. 155.

(*t*) *Colonial Bank* v. *Whinney*, 11 A. C. 426.

(*u*) Bankruptcy Act, 1914, s. 38, re-enacting section 44 of the Act of 1883; *Ward* v. *Duncombe*, [1893] A. C., p. 393; *Re Jenkinson*, 15 Q. B. D. 441.

(*x*) *Ryall* v. *Rowles*, *supra*; *Rutter* v. *Everett*, [1895] 2 Ch. 872; *Re Seaman*, [1896] 1 Q. B. 412; *Re Neal*, [1914] 2 K. B. 910; *Re Collins*, [1925] Ch. 556.

(*y*) *Gardner* v. *Lachlan*, 4 My. & C. 129; cf. *Cooke* v. *Hemming*, L. R. 3 C. P. 334.

trade (*z*). A mere notice, however, in the name of the dissolved firm, to pay debts to one of the partners will not take the debts out of the order and disposition of the firm of which he was a member as it is consistent with the agency (*a*).

And now under section 48, sub-section 5, of the Bankruptcy Act, 1914, re-enacting section 50, sub-section 5, of the Bankruptcy Act, 1883, "where any part of the property of the bankrupt consists of things in action, such things shall be deemed to have been duly assigned to the trustee." But to insure priority he must give notice (*b*).

The trustee, however, takes subject to existing equities (*c*), and an assignee subsequent to but without notice of the bankruptcy obtains priority over the trustee by priority of notice of assignment (*d*).

Shares in a railway company transferable only by deed (*e*), debentures of a joint stock company (*f*), and policies of life assurance (*g*) are all "things in action" within section 38 of the Act, and are exempt from the doctrine of reputed ownership.

(2) *Effect of the Bankruptcy of the Assignor or Covenantor as to future Property.* The effect of the subsequent bankruptcy of an assignor of future property, or of a covenantor who has agreed to settle after-acquired property, or to charge the same, may here be considered. It is clear that if the future property comes into existence prior to the bankruptcy the equitable assignment is complete and the trustee in bankruptcy will take the property subject to the existing equities (*h*). So likewise if the property comes into existence subsequently to the bankruptcy and before the discharge of the bankrupt assignor or covenantor, the trustee will take the legal interest subject to the equity attached thereto. But the assignee can have no greater right than the assignor, in the absence of bankruptcy, would have had. Accordingly, if there is an assignment of rights to arise under a contract existing at the date of the

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(*z*) See *Ex p. Burton*, 1 G. & J. 207; *Ex p. Usborne*, 1 G. & J. 358.

(*a*) *Ex p. Sprague*, 4 De G. M. & G. 866; cf. *Ex p. Woodgate*, 2 Mont. D. & De G. 394.

(*b*) *Re Stone's Will*, W. N. (93) 50.

(*c*) See *Re Anderson*, [1911] 1 K. B. 896, 903.

(*d*) *Re Stone's Will*, W. N. (93) 50; *Mercer* v. *Vans Colina*, [1900] 1 Q. B. 130, n.; *Re Beale*, [1899] 1 Q. B. 688.

(*e*) *Colonial Bank* v. *Whinney*, 11 A. C. 426.

(*f*) *Re Pryce*, 4 Ch. D. 685.

(*g*) *Ex p. Ibbetson*, 8 Ch. D. 519.

(*h*) See, *e.g.*, *Re Wallis*, [1902] 1 K. B. 719.

assignment, *e.g.*, the right to future instalments to become due under the contract, the assignment will be valid against the trustee if the right of the assignor to recover that which is claimed by the assignee had become complete prior to the bankruptcy (*i*). If, however, the continued performance of the contract after the assignor's bankruptcy is necessary for the acquisition of the right claimed, then, since the contract must be continued, if at all, by the trustee in bankruptcy, the assignee will have no title against him (*k*). Where, however, the future property only comes into existence after the discharge of the bankrupt assignor or covenantor, difficulties arise. Discharge operates as a release from liabilities provable in the bankruptcy, and as an assignment of future property can only operate contractually until the property comes into existence, the question arises whether the liability under the assignment is not one provable in bankruptcy and terminated by the discharge. Where the assignment was by way of security for debt, it was held that the debt being released by the discharge the security went with it and no charge could thereafter arise (*l*). But this principle does not apply to assignments and covenants other than those by way of security, and leaves unaffected covenants for the settlement of after-acquired property in marriage settlements. In *Re Reis* (*m*) a general covenant of that nature was held to be unaffected by the subsequent discharge in bankruptcy of the settlor.

Freight.—A mortgagee of a ship, being under the mortgage entitled to the freight as a chose in action (*n*), is, by taking possession, or doing an act equivalent to taking possession, before the freight becomes payable (*o*), entitled to receive it as against the mortgagor or his assignees in bankruptcy (*p*), a judgment creditor (*q*), or assignees for value. In the case of *Liverpool Marine, etc., Co.* v. *Wilson* (*r*), it was held that the first registered mort-

(*i*) *Re Davis & Co.*, 22 Q. B. D. 193; cf. *Ex p. Hall*, 10 Ch. D. 615.
(*k*) *Ex p. Nicholls*, 22 Ch. D. 782; *Wilmot* v. *Alton*, [1897] 1 Q. B. 17; *Re Collins*, [1925] Ch. 556.
(*l*) *Thompson* v. *Cohen*, L. R. 7 Q. B. 527; *Cole* v. *Kernot*, L. R. 7 Q. B. 534, n.; *Collyer* v. *Isaacs*, 19 Ch. D. 343.
(*m*) [1904] 2 K. B. 769; cf. *Hardy* v. *Fothergill*, 13 A. C. 351, at p. 360; *Re Dent*, [1923] 1 Ch. 113.
(*n*) *Kerswill* v. *Bishop*, 2 C. & J. 529.
(*o*) *Shillito* v. *Biggart*, [1903] 1 K. B. 683.
(*p*) *Rusden* v. *Pope*, L. R. 3 Ex. 269; *Wilson* v. *W.*, 14 Eq. 32.
(*q*) *Langton* v. *Horton*, 1 Ha. 549.
(*r*) L. R. 7 Ch. 507; *Shillito* v. *Biggart*, [1903] 1 K. B. 683, 687.

gagee of a ship, by taking possession of her before the freight was completely earned, obtained a legal right to receive the freight, and to retain thereout not only what was due on his first mortgage, but also the amount of any subsequent charge which he might have acquired on the freight, in priority of every equitable charge of which he had no notice; and that it was immaterial that a subsequent incumbrancer was the first to give notice to the charterers of his charge on the freight. So a mortgagee of ship and general freight taking possession of the ship before any freight has become payable from the charterers to the owners, has been held to be entitled to freight in priority of a subsequent particular assignee of freight, although he may have given notice of his assignment to the charterers before the mortgagee took possession of the ship (*s*).

Where an assignee of a ship and cargo has done all in his power towards taking possession, he will not lose his priority (*t*).

Interests in Land.—The rule in *Dearle* v. *Hall*, *supra*, applicable in determining the priority of purchasers, or incumbrancers of choses in action, did not apply to conveyances of or incumbrances upon equitable estates or interests in land, whether freehold or leasehold (*u*); but this has been altered by section 137, subsection 1, of the Law of Property Act, 1925 (*x*).

5. Rights and Remedies of Assignee under an Equitable Assignment.

Where the assignment is of a *chose in action in equity* the assignee could sue for it in his own name in the Court of Chancery (*y*).

Where the assignment was of a *legal chose in action*, the Courts of law for a long time allowed the assignee to sue in the name of the assignor (*z*). If the debtor assented to the transfer of a debt, an action might be brought at law against him by the assignee, on

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(*s*) *Brown* v. *Tanner*, L. R. 3 Ch. 597; *Cato* v. *Irving*, 5 De G. & Sm. 210; *Wilson* v. *W.*, 14 Eq. 32; *Keith* v. *Burrows*, 2 A. C. 636; *Anderson* v. *Butler's, etc., Co.*, 48 L. J. Ch. 828.

(*t*) *Feltham* v. *Clark*, 1 De G. & Sm. 307; *Langton* v. *Horton*, 1 Ha. 549.

(*u*) *Ward* v. *Duncombe*, [1893] A. C., p. 390; see *Jones* v. *J.*, 8 Si. 633; *Wilmot* v. *Pike*, 5 Ha. 14; *Lee* v. *Howlett*, 2 Kay & J. 531; *Phipps* v. *Lovegrove*, 16 Eq. 80; *Ex p. Rabbidge*, 8 Ch. D. 370; *Rooper* v. *Harrison*, 2 Kay & J. 86.

(*x*) *Supra*, p. 121.

(*y*) *Goodson* v. *Ellison*, 3 Russ. 583; *Jones* v. *Farrell*, 1 De G. & J. 208.

(*z*) *Winch* v. *Keeley*, 1 T. R. 619; *De Pothonier* v. *De Mattos*, El. B. & E. 467; *Master* v. *Miller*, 4 T. L. R. 340.

the implied promise to pay (*a*); but if he did not, it could only be brought in the name of the assignor. If the assignment of a personal contract is defective in form, and the person liable upon it promise to pay the demand or satisfy the claim in consideration of time being given him, that will be a new contract, upon which the assignee may sue in his own name.

Equity, however, would interfere with its assistance if the assignor, being properly indemnified against all costs and charges, refused to allow the assignee to use his name or obstructed him when doing so (*b*).

"An ordinary debt or chose in action before the Judicature Act was not assignable so as to pass the right of action at law, but it was assignable so as to pass the right to sue in equity. In his suit in equity the assignee of a debt, even where the assignment was absolute on the face of it, had to make his assignor, the original creditor, party in order primarily to bind him and prevent his suing at law, and also to allow him to dispute the assignment if he thought fit. This was, *a fortiori*, the case where the assignment was by way of security, or by way of charge only, because the assignor had a right to redeem. Further, the assignee could not give a valid discharge for the debt to the original debtor unless expressly empowered so to do. The original debtor, whether he admitted the debt or not, was not concerned with the state of the accounts between the assignor and the assignee where the debt was assigned by way of security; and the rule was that where he did not dispute the debt he should have his costs of the suit out of the debt: he was regarded in the light of a stakeholder. . . . Now it was to afford some remedy for this state of things that sub-section 6 (Judicature Act, 1873, s. 25) was passed" (*c*).

By the Judicature Act, 1925, s. 40, the Courts are to recognise and take notice of all equitable estates, rights, and duties appearing incidentally in any matter and, by section 44, if there is any conflict between the rules of equity and the rules of the common law, the rules of equity are to prevail, so that the assignee of an equitable chose in action can now sue in all the Divisions of the High Court in his own name, but if the subject-matter of the suit be a legal chose in action, then in order to entitle the assignee to

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(*a*) *Israel* v. *Douglas*, 1 H. Black. 239; *Baron* v. *Husband*, 4 B. & Ad. 611.

(*b*) *Hammond* v. *Messenger*, 9 Si. 327, 332; and the judgment of Eldon, C., in *Wood* v. *Griffith*, 1 Swan. 56.

(*c*) *Per* Chitty, L.J., *Durham, etc.*, v. *Robertson*, [1898] 1 Q. B. 765, 769.

sue in his own name (*d*), the provisions of section 25, sub-section 6, of the Judicature Act, 1873 (now replaced by section 136 of the Law of Property Act, 1925, see *infra*, p. 145), must have been complied with.

When a debtor had received notice of an equitable assignment of the debt, he was bound to pay the debt to the assignee, although the assignor might have commenced proceedings against him at law to recover it, and although the equitable assignee refused to indemnify him on receiving payment (*e*). And where a creditor makes an assignment of a debt due or to become due and notice thereof is given to the debtor, if the debtor afterwards voluntarily pays the debt to the assignor, he will be liable to repay it to the assignee (*f*). So where a trustee or executor has notice that a legacy is charged he must withhold all further payments to the legatee, unless by consent of the assignee (*g*), but he is not bound to pay over the whole amount to a first incumbrancer (*h*). Notice to a debtor who has given a negotiable instrument for his debt that the debt has been assigned by the creditor can be disregarded by the debtor (*i*).

6. The Assignment of a Chose in Action is " subject to all Equities."

The assignee, whether of a chose in action or a trust fund, can acquire no greater rights under the assignment than those enforceable by the assignor, and he therefore takes subject to all defences existing in respect of the right assigned which would be available against the assignor seeking to enforce the right assigned; provided that the matters on which such defences are based occurred before notice of the assignment was given to the person liable. This principle is shortly expressed by the statement that the assignee takes subject to all equities. The assignee therefore takes subject to rights of set-off and all defects in the title of the assignor (*k*).

(*d*) See, *e.g.*, *Brandts* v. *Dunlop*, [1905] A. C. 454.

(*e*) *Jones* v. *Farrell*, 1 De G. & J. 208; *Hutchinson* v. *Heyworth*, 9 A. & E. 375.

(*f*) *Brice* v. *Bannister*, 3 Q. B. D. 569.

(*g*) *Stephens* v. *Venables*, 30 B. 625.

(*h*) *Re Bell*, [1896] 1 Ch. 1; *Hockey* v. *Western*, [1898] 1 Ch. 350; *Re Lloyd*, [1903] 1 Ch., p. 403.

(*i*) *Bence* v. *Shearman*, [1898] 2 Ch. 582.

(*k*) *Turton* v. *Benson*, 1 P. W. 496; *Coles* v. *Jones*, 2 Vern. 692; *Hamil* v. *Stokes*, 4 Pr. 161; 18 R. R. 730; *Priddy* v. *Rose*, 3 Mer. 86; *Dibbs* v. *Goren*, 11 B. 483; *Houlditch* v. *Wallace*, 5 Cl. & Fin. 629; *Ward* v. *W.*, 4 Ir. Ch. 215, 220; *Cockell* v. *Taylor*, 15 B. 103; *Smith* v. *Parkes*, 16 B. 115; *Rolt* v. *White*, 31 B. 520; *Graham* v. *Johnson*, 8 Eq. 36; *Re Hercules, etc., Co.*, 19 Eq. 302; *Mangles*

Ryall v. Rowles.

Set-off and analogous defences.—An assignee of money to arise under a contract will only be entitled to it subject to the conditions of the contract (*l*).

The assignee of a debt is bound by the state of the accounts between the assignor and the debtor at the date of the assignment. And if a creditor assigns over a debt which has been partially satisfied, the assignee, although without notice, will take subject to the state of accounts at the date of the assignment (*m*), and further, will be obliged to allow the payments which the debtor subsequently makes to the creditor before notice of the assignment (*n*), and the debtor may set off as against the assignee a debt accruing due to him from the assignor before notice of the assignment (*o*). In *Christie* v. *Taunton* (*p*), T., who held shares and debentures in a company, deposited in March, 1890, debentures with the plaintiff bank to secure a debt. The debentures were not payable until December 31, 1890, unless a winding-up took place. On November 3, 1890, a call was made, and became on that date a debt due from T. to the company. On November 6, the plaintiff bank gave notice of the assignment to the company. On November 12, the plaintiffs commenced a debenture-holders' action. On the 19th the company went into liquidation, and further calls were made on T. *Held*, that the company could set off in respect of the calls made before the winding-up, but not in respect of those made after. After notice of an equitable assignment the debtor cannot set off as against the assignee a debt which accrues due subsequently to the date of the notice, although that debt may arise out of a previous liability. The assignee will only take subject to equities arising out of the same transaction as the debt assigned. So where the creditors of a company proved their debts in the liquidation and assigned them to H., and H. assigned

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v. *Dixon*, 3 H. L. Cas. 702; *Phipps* v. *Lovegrove*, 16 Eq. 80; *Roxburghe* v. *Cox*, 17 Ch. D. 520; *Re Romford, etc., Co.*, 24 Ch. D. 85.

(*l*) *Newfoundland* v. *N. Ry. Co.*, 13 A. C. 199; *Tooth* v. *Hallett*, L. R. 4 Ch 242. See *Bristow* v. *Whitmore*, 9 H. L. Cas. 391; *Young* v. *Kitchin*, 3 Ex. D. 127, 130; *Brice* v. *Bannister*, 3 Q. B. D. 577; *Ex p. Moss*, 14 Q. B. D. 310; *Drew* v. *Josolyne*, 18 Q. B. D. 590. Cf. *Stoddart* v. *Union Trust, Ltd.*, [1911] 1 K. B. 181; *Lawrence* v. *Hayes*, [1927] 2 K. B. 111, 120.

(*m*) *Ord* v. *White*, 3 B. 357; *Smith* v. *Parkes*, 16 B. 115; *Rolt* v. *White*, 31 B. 520.

(*n*) *Norrish* v. *Marshall*, 5 Madd. 475; *Stocks* v. *Dobson*, 4 De G. M. & G. 11.

(*o*) *Watson* v. *Mid-Wales R. C.*, L. R. 2 C. P. 593; *Wilson* v. *Gabriel*, 4 B. & S. 243; cf. *Re Goy*, [1900] 2 Ch. 149; *Phœnix, etc., Ltd.* v. *Earls Court, Ltd.*, 30 T. L. R. 50.

(*p*) [1893] 2 Ch. 175.

them to T., and the official liquidator subsequently recovered £2,000 against H., T. was held entitled to the dividend on his debts, and a claim by the official liquidator to set off the £2,000 against such dividend was dismissed (*q*), for the two demands were of a totally different origin, and equity will not allow, against the equitable chose in action, a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it (*r*). But in the case of legal choses in action, the right of set-off seems to be wider (*s*).

Where by the articles of association of a company, it is provided that the company should have a first and permanent lien and charge available at law and equity, on every share, for all debts due from the shareholders to the company, the rule in *Hopkinson* v. *Rolt* (*t*) applies, and the company cannot under its lien claim priority over subsequent incumbrances on shares in respect of moneys which become due to the company from the shareholder after the company has received notice thereof (*u*).

Defects in title.—Where though the assignor purports to assign a right no right is in fact vested in him at the date of the alleged assignment, manifestly the assignee can obtain no title though he gives value and has no notice of the invalidity of the right assigned. Thus if a satisfied bond or a bond void at law or in equity be assigned, the assignee can neither enforce the bond nor rely upon it as a defence (*x*). Further if the transaction out of which the right assigned arises is liable to be set aside as against the assignor by reason of fraud, misrepresentation, or other ground of relief, the assignee acquires only a defeasible title and the relief which

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(*q*) *Re Milan Tramways Co.*, 25 Ch. D. 586; *Re Goy*, [1900] 2 Ch. 149; *Re Brown & Gregory, Ltd.*, [1904] 1 Ch. 627; *Re Palmer, etc., Co.*, [1904] 2 Ch. 743; *Re Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239; and see *Newfoundland* v. *N. Ry. Co.*, 13 A. C. 199.

(*r*) *Watson* v. *Mid-Wales Ry. Co.*, L. R. 2 C. P. 593. And see further as to set-off, *Cavendish* v. *Greaves*, 24 B. 163; *Burroughs* v. *Moss*, 10 B. & C. 558; *Re Dublin & Rathcoole Ry. Co.*, 12 Ir. R. 98; *Young* v. *Kitchin*, 3 Ex. D. 127; *Re China Steamship Co.*, 7 Eq. 240; *Re Natal Investment Co.*, L. R. 3 Ch. 355; *Re Romford Canal Co.*, 24 Ch. D. 85; *Newfoundland* v. *N. Ry. Co.*, *supra*.

(*s*) See *Bennett* v. *White*, [1910] 2 K. B. 643.

(*t*) 9 H. L. Cas. 114.

(*u*) *Bradford Banking Co.* v. *Briggs*, 12 A. C. 29; *Deeley* v. *Lloyds Bank*, [1912] A. C. 756, 774; *Mackereth* v. *Wigan Coal and Iron Co.*, [1916] 2 Ch. 293, 302.

(*x*) *Turton* v. *Benson*, 1 P. W. 496.

could be obtained against the assignor can be obtained against the assignee (*y*).

Assignees for value of a residuary estate in Court in a suit in which it has been certified that all debts have been paid, will take subject to the claims of other creditors coming in and establishing their right to prove (*z*). So, if a trustee or executor assign a beneficial interest he may have taken under the will or trust, the assignee takes it subject to the equities which attached to the assignor; and therefore, if the latter, whether previously or subsequently to the assignment, commits a breach of trust whereby a debt becomes due to the estate, the assignee cannot claim the beneficial interest till he has satisfied the debt (*a*). But where the assignor became executor or trustee *after* the assignment took place no equity arises in respect of a debt subsequently incurred (*b*).

Where a *cestui que trust* is indebted to the estate by reason of his having profited by a breach of trust, an assignee for value of his beneficial interest will take it, subject to the equity of making good the breach of trust by which the assignor has profited (*c*), and an executor was held entitled to set off against the assignee the costs of an action brought by the legatee against the executor (*d*).

But after an assignee has given notice of the assignment the trustee or obligee can, as against the assignee, create no new charge or right of set-off (*e*).

Exceptions to Rule.—Although the rule generally holds good, that whoever takes an assignment of a chose in action takes it subject to all its equities, it has been held that the rule must yield where a contrary intention appears from the nature or in the terms of the contract (*f*). "There is nothing to prevent a debtor from

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(*y*) *Mangles* v. *Dixon*, 3 H. L. Cas. 702; *Graham* v. *Johnson*, 8 Eq. 36; but see *Re Romford Canal Co.*, 24 Ch. D. 85; *Stoddart* v. *Union Trust, Ltd.*, [1912] 1 K. B. 181.

(*z*) *Hooper* v. *Smart*, 1 Ch. D. 90; *Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(*a*) *Morris* v. *Livie*, 1 Y. & C. C. C. 380; *Clack* v. *Holland*, 19 B. 262; *Wilkins* v. *Sibley*, 4 Gif. 442; *Cole* v. *Muddle*, 10 Ha. 186.

(*b*) *Irby* v. *I.*, 25 B. 632.

(*c*) *Priddy* v. *Rose*, 3 Mer. 86; *Willes* v. *Greenhill* (*No.* 1), 29 B. 376; *Stephens* v. *Venables* (*No.* 1), 30 B. 625.

(*d*) *Re Knapman*, 18 Ch. D. 300. Cf. *Re Jones*, [1897] 2 Ch. 190.

(*e*) *Stephens* v. *Venables*, 30 B. 625, 627; *Willes* v. *Greenhill*, 29 B. 376; *Cavendish* v. *Greaves*, 24 B. 163, 173; *Moore* v. *Jervis*, 2 Coll. Ch. R. 60.

(*f*) *Re Agra, etc., Bank*, L. R. 2 Ch. 391; *Re Blakely Ordinance Co.*, L. R. 3 Ch. 154.

contracting with his creditor that he will not avail himself against a transferee of any rights which he may possess against the creditor or any assignee of his " (*g*). Moreover, any person may release those equities who is entitled to the benefit of them, and he may do so, either positively by words, in writing, or by the whole course of his conduct (*h*). And parties entitled to equities may lose their right to enforce them against the assignee, by neglecting to give him timely notice of any fact to which they have been accessory, tending to mislead him as to the real interest of the assignor (*i*).

Negotiable Instruments.—Where an instrument is transferable like cash by delivery, or by indorsement and delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument (*k*). Such instruments are, in the hands of *bona fide* holders for value, *free from all equities*. And in the hands of such a holder it is immaterial whether the person who delivered them either sold them or pledged them; in either case he would pass the property absolute or qualified to such holder (*l*), and mere negligence, on the part of a transferee of a negotiable instrument, to avail himself of means at his disposal to detect the bad title of the transferor, cannot be pleaded as a defence to an action on the instrument by the transferee (*m*). The following are negotiable instruments :—Bank notes (*n*), Bills of exchange, Promissory notes, Cheques on banker (*o*), Exchequer bills (*p*), Endorsed bills of lading (*q*),

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(*g*) *Per* Stirling, J., in *Re Goy & Co.*, [1900] 2 Ch., at p. 154; and see *Dickson* v. *Swansea Vale, etc.*, L. R. 4 Q. B. 44; *Re Rhodesia Goldfields, Ltd.*, [1910] 1 Ch. 239.

(*h*) *Re Assam Tea Co.*, 10 Eq. 458, 463; *Re Agra, etc., Bank*, L. R. 2 Ch. 391; *Higgs* v. *Assam Tea Co.*, L. R. 4 Ex. 387; *Re General Estates Co.*, L. R. 3 Ch. 758; *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Re Hercules Insurance Co.*, 19 Eq. 302; *Webb* v. *Herne Bay Commissioners*, L. R. 5 Q. B. 642; cf. *Re Romford Canal Co.*, 24 Ch. D. 85.

(*i*) *Mangles* v. *Dixon*, 3 H. L. Cas. 702; *Ex p. City Bank*, L. R. 3 Ch., p. 762.

(*k*) See *Crouch* v. *Crédit Foncier*, L. R. 8 Q. B., p. 381; *London J. S. Bank* v. *Simmons*, [1892] A. C., p. 215; *Bechuanaland Exploration Co.* v. *London Trading Bank*, [1898] 2 Q. B. 658; Chalmers, Bills of Exchange (8th ed.), p. 373.

(*l*) *Wookey* v. *Pole*, 4 B. & Ald., p. 13; *Collins* v. *Martin*, 1 Bos. & P. 648; *London, etc., Bank* v. *London River Plate Bank*, 21 Q. B. D., p. 540; *London J. S. Bank* v. *Simmons*, [1892] A. C. 201.

(*m*) *Venables* v. *Baring & Co.*, [1892] 3 Ch. 527; and see *Scholfield* v. *Londesborough*, [1896] A. C. 514.

(*n*) *Miller* v. *Race*, 1 Burr. 452.

(*o*) See Bills of Exchange Act, 1882, ss. 8, 38, 73 and 89.

(*p*) *Wookey* v. *Pole*, 4 B. & Ald. 1.

(*q*) *Rodger* v. *Comptoir, etc., de Paris*, L. R. 2 P. C., p. 405; *Chartered Bank, etc.* v. *Henderson*, L. R. 5 P. C. 501; *Kemp* v. *Falk*, 7 A. C., p. 581.

Foreign scrip (*r*), Foreign bonds (*s*), Foreign scrip issued by agent in England (*t*), American railway bond with collateral mortgage (*u*).

In the *Bechuanaland Exploration Co.* v. *London Trading Bank, Ltd.* (*x*), it was held, on proof of usage treating debentures payable to bearer issued by an English company in England as negotiable instruments transferable by delivery, that such debentures were negotiable, and it has been since held that evidence of usage is not necessary, the Court taking notice of the fact that they were negotiable.

If the instrument on the face of it shows it was only intended to pass under a separate instrument of transfer it will not be a negotiable instrument (*y*). But if it contains a representation on the face of it that all the rights it represents will pass to the holder on delivery, then, whether it be a negotiable instrument or not, the person legally entitled may be estopped, on the principle of *Pickard* v. *Sears* (*z*), from disputing the title of the holder (*a*).

Dividend warrants of the Bank of England being in the form of cheques payable to a particular person without any words to make them transferable are not negotiable (*b*), nor, it seems, are coupons detached from foreign bonds passing by delivery (*c*).

The indorsee of an overdue bill of exchange or note takes it subject to all defects of title affecting it at maturity (*d*).

A person who without inquiry takes from another an instrument signed in blank by a third party, and fills up the blanks, cannot, even in the case of a negotiable instrument, claim the benefit of being a purchaser for value without notice, so as to acquire a greater right than the person from whom he himself received the

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(*r*) *Goodwin* v. *Robarts*, 1 A. C. 476.

(*s*) *Gorgier* v. *Mieville*, 3 B. & C. 45; *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171; *Heseltine* v. *Siggers*, L. R. 1 Ex. 856.

(*t*) *Goodwin* v. *Robarts*, 1 A. C. 476; *Lang* v. *Smyth*, 7 Bing. 284.

(*u*) *Venables* v. *Baring & Co.*, [1892] 3 Ch. 527.

(*x*) [1898] 2 Q. B. 658; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144; *Webb* v. *Alexandra W. Co.*, 93 L. T. 339; and see *Re Blakely Ordnance Co.*, L. R. 3 Ch. 154; *Re General Estates Co.*, *ibid.* 758.

(*y*) Cf. *Yeo* v. *Dawe*, 33 W. R. 739; cf. *Mortgage I. C.* v. *Commissioner, etc.*, 21 Q. B. D., p. 355.

(*z*) 6 A. & E., p. 474.

(*a*) *Goodwin* v. *Robarts*, 1 A. C., p. 490; *Colonial Bank* v. *Cady*, 15 A. C. 267.

(*b*) *Partridge* v. *Governor and Company of the Bank of England*, 9 Q. B. 396.

(*c*) *Lang* v. *Smyth*, 7 Bing. 284.

(*d*) See Bills of Exchange Act, 1882, s. 36, sub-s. 2; Chalmers, Bills of Exchange (8th ed.), p. 136. See *Re European Bank*, L. R. 5 Ch. 358; *Ex p. Swan*, 6 Eq., p. 359.

instrument (*e*). *A fortiori* will this be the result in the case of an instrument not negotiable (*f*).

Stoppage in transitu.—The right of an unpaid vendor to stop the goods while *in transitu* cannot be defeated by a resale to a third person, even when the price has been paid, unless that third person takes delivery of the bill of lading, duly indorsed, without notice of the original purchaser's insolvency (*g*).

7. Choses in Action how far made Assignable by Statute.

Policies of Life Assurance.—Before the Act of 1867, 30 & 31 Vict. c. 144, a policy could not be assigned at law, but all the benefit of the policy moneys could be given to another person by the policy-holder by the execution of a declaration of trust (*h*). Where a life policy which was to become void, if the assured should commit suicide, unless the policy should have been "legally assigned," had been deposited to secure a sum of money, it was held to be a sufficient assignment to come within the exception, and that notice of it to the office was unnecessary (*i*). In *Re Turcan* (*k*), T. on his marriage covenanted to settle his estate or interest in any property or estate to which he should become possessed or entitled during the marriage by devise, bequest, purchase or otherwise. He effected some policies, one of which was subject to a condition that it should not be assignable in any way whatever. *Held*, that the covenant was divisible, that T. had become possessed of "property" by purchase, within the covenant, that the condition in the policy was intended only to prevent T. from assigning the policy at law, and that the moneys passed to the trustees.

By the Policies Assurance Act, 1867, 30 & 31 Vict. c. 144, it is enacted that—

1. "Any person or corporation now being or hereafter becoming entitled, by assignment or other derivative title, to a policy of life assurance, and possessing at the time of action brought the right in equity to receive and the right to give an effectual dis-

(*e*) *France* v. *Clark*, 26 Ch. D. 257; *Hogarth* v. *Latham*, 3 Q. B. D. 643; *Hatch* v. *Searles*, 2 Sm. & G. 147; *Taylor* v. *G. I. P. R. Co.*, 4 De G. & J. 559; *Colonial Bank* v. *Cady*, 15 A. C. 267. Cf. *Fry* v. *Smellie*, [1912] 3 K. B. 282.

(*f*) *France* v. *Clark*, *supra*; *Hibblethwaite* v. *McMorine*, 6 M. & W. 200; *Swan* v. *N. B. A. Co.*, 2 H. & C. 175.

(*g*) *Ex p. Golding*, *Davis & Co.*, 13 Ch. D. 628; *Kemp* v. *Falk*, 7 A. C. 573; *Lickbarrow* v. *Mason*, 2 T. R. 63.

(*h*) See *Re Turcan*, 40 Ch. D., p. 10.

(*i*) *Dufaur* v. *The Professional L. A. O.*, 25 B. 599; and see *Jones* v. *The Consolidated A. Co.*, 26 B. 256.

(*k*) 40 Ch. D. 5.

charge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."

3. "No assignment made after the passing of this Act of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or in case they have two or more principal places of business, then at some one of such principal places of business, either in England, Scotland, or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bona fide* made in respect of any policy by any assurance company before the date on which such notice shall have been received shall be as valid against the assignee giving such notice as if this Act had not been passed."

4. "Every assurance company shall on every policy issued by them after the 30th of September, 1867, specify their principal place or principal places of business at which notices of assignment may be given in pursuance of this Act."

6. "Every assurance company to whom notice shall have been duly given of the assignment of any policy under which they are liable shall, upon the request in writing of any person by whom any such notice was given or signed, or of his executors or administrators, and upon payment in each case of a fee not exceeding five shillings, deliver an acknowledgment in writing under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, secretary, treasurer, or other principal officer of the assurance company whose acknowledgment the same purports to be, shall be conclusive evidence as against such assurancse company of their having duly received the notice to which such acknowledgment relates."

And it is provided by section 8—"that this Act shall not apply to any policy of assurance granted or to be granted or to any contract for a payment on death entered into or to be entered into in pursuance of the provisions of 16 & 17 Vict. c. 45, and 27 & 28

Vict. c. 43, or either of those Acts (*l*), or to any engagement for payment on death by any friendly society" (*m*).

Section 1 does not increase the power of assignment previously existing, but facilitates recovery of the policy moneys by enabling the assignee to sue in his own name.

An agreement in writing to execute on request an effectual mortgage of a policy of assurance deposited with another, at the time of the agreement, as security for a loan, is not an assignment of such policy within the meaning of the Policies of Assurance Act, 1867. Accordingly notice to the assurance company of such an agreement does not under that Act give any priority over a prior equitable mortgagee who has given no notice to the company, but has possession of the policy (*n*). The Act was passed for the convenience and protection of insurance offices and regulates the rights between the insurance office and the persons interested in the policy, but does not affect the rights of those persons *inter se*. Accordingly, where a first incumbrancer on a policy has not given such notice as is prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice, North, J., held, that the second incumbrancer did not thereby gain priority (*o*). A condition that a policy is not to be assigned in any case whatever, and a proviso that the company are not to be bound to recognise any equitable dealings with the policy, does not prevent a policy-holder dealing with the beneficial interest (*p*).

By section 50, sub-section 2 of the Marine Insurance Act, 1906 (*q*), where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee is entitled to sue on the policy in his own name.

A policy of marine assurance can be assigned, after loss, so as to entitle the assignee to sue upon it in his own name (*r*). But not after the interest of the assignor has ceased by a delivery of the cargo to the purchaser (*s*), unless there had been an agreement to assign the policy before such interest ceased (*t*).

(*l*) These statutes are repealed, in part, by 45 & 46 Vict. c. 51.

(*m*) See *The Scottish, etc., L. A. Society* v. *Fuller*, 2 Eq. 53.

(*n*) *Spencer* v. *Clarke*, 9 Ch. D. 137; and see *Re Weniger's Policy*, [1910] 2 Ch. 291.

(*o*) *Newman* v. *N.*, 28 Ch. D. 674; *Re Holmes*, 29 Ch. D. 786.

(*p*) *Re Turcan*, 40 Ch. D. 5.

(*q*) 6 Edw. 7, c. 41. See *William Pickersgill, etc., Ltd.* v. *London, etc., Co., Ltd.*, [1912] 3 K. B. 614.

(*r*) *Lloyd* v. *Fleming*, L. R. 7 Q. B. 299.

(*s*) *North of England, etc., Co.* v. *Archangel I. Co.*, L. R. 10 Q. B. 249, 253.

(*t*) *Ibid.* 254, *per* Lush, J.

Ryall v. Rowles.

Legal Assignment under the Law of Property Act, 1925.—By section 136 of the Law of Property Act, 1925, re-enacting (in substance) section 25, sub-section 6 of the Judicature Act, 1873, it is enacted that " (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice :—

" (a) the legal right to such debt or thing in action;

" (b) all legal and other remedies for the same; and

" (c) the power to give a good discharge for the same without the concurrence of the assignor :

" Provided that if the debtor, trustee or other person liable in respect of such debt or thing in action has notice—

" (a) that the assignment is disputed by the assignor or any person claiming under him; or

" (b) of any other opposing or conflicting claim to such debt or thing in action;

" he may, if he thinks fit, either call upon the persons making claim thereto to interplead concerning the same, or pay the debt or other thing in action into Court under the provisions of the Trustee Act, 1925 (*u*).

" (2) This section does not affect the provisions of the Policies of Assurance Act, 1867."

In order to constitute a legal assignment under this section : Firstly, there must be an *absolute* assignment not purporting to be by way of charge only (*x*). The assignment may be absolute although the instrument of assignment be a mortgage containing a proviso for redemption and re-assignment (*y*); and an assignment absolute in terms, though only by way of security, since equity would imply a right to re-assignment, falls within the section. A conditional assignment, owing to the uncertainty in which it would

(*u*) Section 63.

(*x*) *Burlinson* v. *Hall*, 12 Q. B. D. 347; *Comfort* v. *Betts*, [1891] 1 Q. B. 737; *Mercantile Bank of London* v. *Evans*, [1899] 2 Q. B. 613; *Hughes* v. *Pump House Hotel Co.*, [1902] 2 K. B. 190.

(*y*) *Tancred* v. *Delagoa Bay, etc., Co.*, 23 Q. B. D. 239; *Durham Bros.* v. *Robertson*, [1898] 1 Q. B. 765.

place the debtor, is excluded (*z*). Secondly, the subject-matter of the assignment must be a debt or other legal chose in action (*a*). The assignment of part of a debt is not, it appears, within the section (*b*). The assignment must be of a definite and ascertained amount (*c*). Contracts to lend money or make further advances are not assignable debts (*d*). In *Manchester Brewery Co.* v. *Coombs* (*e*), Farwell, J., held that the benefit of a covenant contained in a lease of an hotel to purchase all beer from the lessor was an assignable chose in action. It would seem that the term chose in action "includes all rights the assignment of which a Court of law or equity would before the Act have considered lawful" (*f*). An assignment of a future debt is within the section (*g*). An assignment of a mere right of litigation is bad (*h*); but an assignment of property is valid, even though such property may be incapable of being recovered without litigation (*i*). The benefit of a personal contract is unassignable under the statute (*k*), as in equity. Thirdly, express notice in writing of the assignment must have been given. The Act, however, contains no provision as to when or by whom the notice is to be given. Apparently notice by either the assignor or assignee is valid (*l*), and notice may be given after the death of the assignor (*m*). The assignment need not be for consideration (*n*). The legal right to the debt is by an

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(*z*) *Durham Bros.* v. *Robertson*, *supra*.

(*a*) *Colonial Bank* v. *Whinney*, 11 A. C. 426; *King* v. *Victoria, etc., Co.*, [1896] A. C. 250; *Torkington* v. *Magee*, [1902] 2 K. B. 427; *Tolhurst* v. *Assoc., etc.*, [1903] A. C. 414; *Dawson* v. *G. N. & C. Ry.*, [1905] 1 K. B. 260.

(*b*) See judgment of Chitty, L.J., in *Durham Bros.* v. *Robertson*, [1898] 1 Q. B., p. 774; *Forster* v. *Baker*, [1910] 2 K. B. 636; *Re Steel Wing Co.*, [1921] 1 Ch. 349; but see *Skipper* v. *Holloway*, [1910] 2 K. B. 630.

(*c*) *Jones* v. *Humphreys*, [1902] 1 K. B. 10.

(*d*) *Western Waggon Co.* v. *West*, [1892] 1 Ch. 271; *May* v. *Lane*, 64 L. J Q. B. 236; but note Companies Act, 1908, s. 105.

(*e*) [1901] 2 Ch. 608.

(*f*) *King* v. *Victoria Insurance Co.*, *supra*; and see *May* v. *Lane* and *Torkington* v. *Magee*, *supra*.

(*g*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511; and cf. *Brice* v. *Banister*, 3 Q. B. D. 569, apparently a case of equitable assignment; see *Durham Bros.* v. *Robertson*, *supra*.

(*h*) *Dawson* v. *G. N. & C. Ry.*, [1905] 1 K. B. 260.

(*i*) [1905] 1 K. B., p. 271; *Defries* v. *Milne*, [1913] 1 Ch. 98.

(*k*) *Kemp* v. *Baerselman*, [1906] 2 K. B. 604.

(*l*) *Bateman* v. *Hunt*, [1904] 2 K. B. 530, 538; *Denney* v. *Conklin*, [1913] 3 K. B. 177.

(*m*) *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 517; *Bateman* v. *Hunt*, [1904] 2 K. B. 530.

(*n*) *Harding* v. *H.*, 17 Q. B. D. 442; *Re Westerton*, [1919] 2 Ch. 104; *Walker* v. *Bradford Old Bank*, 12 Q. B. D. 511.

assignment under the section completely transferred to the assignee and becomes as though it had been his from the beginning (*o*).

8. Subrogation.

Subrogation involves a transfer of rights, and therein resembles equitable assignment. Its distinguishing feature is that it arises not by agreement between parties but by operation of law. It consists in the substitution of a new creditor for an old creditor as against a debtor in relation to some particular subject-matter. In subrogation strictly so called there is a transfer of all the rights of the old creditor to the new creditor; there are, however, cases in which the idea of subrogation is involved and the term employed although the substitution is incomplete.

It is difficult to deduce from the authorities any principle which will at the same time account for all the cases in which subrogation has been granted and explain its denial in other cases. A. It has been applied to cases where the transaction between the old creditor and debtor was one of indemnity. B. In certain cases where the debtor has been benefited by the discharge of the old creditor's claim out of moneys provided by the new creditor, the latter is permitted to stand in the former's place. C. Another case which does not appear to fall under either of the two former heads is that in which an executor empowered to carry on a business with the whole or some part of the assets of the testator incurs debts and the creditors of the business are allowed to claim in respect of such debts payment directly from the testator's estate to the extent to which the executor is entitled to be indemnified out of the assets.

A. Under this head come contracts of marine and fire insurance and the contract of suretyship (*p*). "The contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified" (*q*). This doctrine of subrogation must be carried to the extent that as between the underwriter and the assured the underwriter is entitled to the advantage "of every right of the assured whether such right consists in contract fulfilled or unfulfilled or in

(*o*) *Bennett* v. *White*, [1910] 2 K. B. 1.

(*p*) For subrogation in suretyship, see *infra*, Vol. II, under *Dering* v. *Earl of Winchelsea*.

(*q*) *Castellain* v. *Preston* (1883), 11 Q. B. D., *per* Brett, L.J., at p. 386.

remedy for tort capable of being insisted on or already insisted on or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be, or has been diminished" (*r*). The insurer under a fire policy of a person who has a remedy against someone else to compel him ultimately to make good the loss stands in the position of a surety. "When a surety pays a debt he has the right to be put in the place of the creditor as against the principal debtor and to use all the remedies which the creditor could have used as against the principal debtor in order that the surety may recover back the sum which he has paid and which the creditor has a right to demand from him" (*s*). The principle underlying subrogation in the case of insurance and suretyship appears to be identical, but subrogation by act of law does not give an insurer the right to sue in a Court of law in his own name (*t*).

B. The earliest examples of cases falling under the second head are those in which a person who has lent money to a deserted wife for the payment of debts incurred for necessaries is allowed to stand in the place of the person who has been paid (*u*). These cases have been explained upon the basis of an assignment (*x*) between the old and the new creditor.

Another example of this class of subrogation arises where the new creditor advances to the debtor the whole or part of the purchase money for land which the debtor is under contract to buy and becomes entitled to the lien which the vendor would have had for unpaid purchase money (*y*), and this lien will be supported against the trustee in bankruptcy of the debtor (*z*). These cases appear to be true examples of subrogation although the ground upon which the decision in the case of *Meux* v. *Smith* (*z*) is based is, that the

(*r*) 11 Q. B. D., at p. 388; and see *West of England Fire Insurance Co.* v. *Isaacs*, [1897] 1 Q. B. 226.

(*s*) *Darrell* v. *Tibbitts* (1880), 5 Q. B. D., at p. 563, *per* Cotton, L.J.; and see *North British, etc., Insurance Co.* v. *London, etc., Insurance Co.* (1877), 5 Ch. D. 569.

(*t*) *King* v. *Victoria Insurance Co.*, [1896] A. C. 250.

(*u*) *Harris* v. *Lee*, 1 P. W. 482; *Marlow* v. *Pitfeild*, 1 P. W. 558.

(*x*) *Jenner* v. *Morris*, 3 De G. F. & J., at p. 52.

(*y*) *Brocklesby* v. *Temperance Permanent Building Society*, [1895] A. C. 173; *Nottingham Permanent Benefit Building Society* v. *Thurstan*, [1903] A. C. 6; *Re Conolly Bros., Ltd.*, [1912] 2 Ch. 25.

(*z*) *Bird* v. *Philpott*, [1900] 1 Ch. 822, following *Meux* v. *Smith*, 11 Si. 410; and see *Re Conolly Bros., supra.*

transaction was, by a contemporaneous contract which may be inferred, *pro tanto* for the benefit of the lender (*a*).

The term subrogation has also been applied to cases in which a company has borrowed money in excess of its borrowing powers although it may be doubted whether the rights conferred on the lender really arise by subrogation. It is clear that the lender is entitled to rank or claim as a creditor against the company to the extent that moneys advanced by him have been used in discharging antecedent liabilities contracted under its borrowing powers. There is, however, no transfer or assignment of any of the rights of the old creditor to the new creditor, and the new creditor's rights against the company are governed by his contractual relation with the company irrespective of the relation between the old creditor and the company. In certain of the cases the rights of the lender against the company have been based upon a fictional assignment of the debt in the nature of a subrogation (*b*). In *Re Wrexham, Mold and Connah's Quay Railway Co.* (*c*), where the main question was whether the lender enjoyed the securities or priorities of the creditor whose debt had been discharged, the Court of Appeal refused to base the lender's rights on any fictional assignment, and Rigby, L.J., referring to the cases before mentioned, stated that "the great preponderance of authority shows that the doctrine of subrogation has very little, if anything at all, to do with the equity really enforced in the cases." The test in these cases is whether as the result of the two transactions the liabilities of the company have been increased, and the new creditor's rights against the company are held good in so far as there has been no such increase (*d*).

The doctrine which has been applied in the case of a company exceeding its borrowing powers is not limited to the cases of companies, but is also applied in the case of an agent borrowing in excess of the authority conferred by his principal. Where money is borrowed on behalf of a principal by an agent without authority, although the principal cannot be sued at law, yet in equity to the extent to which the money borrowed has in fact been applied in paying legal debts and obligations of the principal, the lender is

(*a*) 11 Si. 432.

(*b*) See, *e.g.*, *Baroness Wenlock* v. *River Dee Co.*, 19 Q. B. D. 155, at p. 165; *Re Birkbeck Building Soc.*, [1912] 2 Ch. 184, 231.

(*c*) (1899), 1 Ch. 440; cf. *Re Johnston Foreign, etc., Co.*, [1904] 2 Ch. 234.

(*d*) *Re Birkbeck Building Society*, [1912] 2 Ch., pp. 231, 232; *Reversion F. & I. Co.* v. *Maison Cosway*, [1913] 1 K. B. 364.

entitled to stand in the same position as if the money had originally been borrowed by the principal (*e*). In this class of cases it makes no difference that the lender may be aware that the agent is exceeding his authority (*f*).

C. When a trustee or an executor is authorised to carry on a business with a specified portion of the testator's assets, a creditor who trusts the executor or trustee has a right to the benefit of the indemnity or lien which the executor or trustee has against the assets devoted to the purposes of the trade (*g*).

The right of the creditors is the right to put themselves in the place of a trustee who is entitled to an indemnity, and if the trustee is not entitled except on the terms of making good a loss to the trust estate the creditors have no better right (*h*). But where the business is so carried on by several trustees one of whom is a defaulter, the creditor does not lose the benefit of subrogation (*i*).

9. Assignments contrary to Public Policy; Champerty and Maintenance.

General Principle.—"You are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting" (*k*).

Pensions and Salaries.—The Courts, upon the ground of public policy, will not give effect to agreements to assign or assignments of pensions and salaries of public officers, payable to them for the purpose of keeping up the dignity of their office, or to assure a due discharge of its duties. But the office must be a public one in the strictest sense, and the pay must come out of national, and not local funds (*l*). The following interests have been held not assignable :

(*e*) *Bannatyne* v. *MacIver*, [1906] 1 K. B. (C. A.) 103.

(*f*) *Reversion F. & I. Co.* v. *Maison Cosway*, [1913] 1 K. B., pp. 373, 378, 382.

(*g*) *Re Johnson*, 15 Ch. D. 548; and see *Ex p. Garland*, 10 V. 110; *Re Blundell*, 44 Ch. D. 1; *Dowse* v. *Gorton*, [1891] A. C. 190.

(*h*) *Ex p. Edmonds*, 4 De G. F. & J. 488; *Re British Power, etc., Co.*, [1910] 2 Ch. 470.

(*i*) *Re Frith*, [1902] 1 Ch. 342.

(*k*) *Per* Jessel, M.R., *Printing, etc., Co.* v. *Sampson*, 19 Eq., p. 465; *Re Mirams*, [1891] 1 Q. B., p. 595; and see *per* Lord Halsbury, C., in *Janson* v. *Driefontein Mines*, [1902] A. C., at p. 491.

(*l*) *Re Mirams*, [1891] 1 Q. B. 594, 596.

Ryall v. Rowles.

The full or half-pay of an officer in the army (*m*); the salary of an assistant parliamentary counsel for the Treasury (*n*); and of a clerk of the peace (*o*); the pension allowed to a retired clerk under the Incumbents' Resignation Act, 1871, c. 44, s. 10 (*p*). A clergyman having the cure of souls is (*semble*) not a public officer, and the salary of the chaplain to a workhouse payable out of the poor-rate is assignable (*q*). That the salary of a Judge, given to him for the support of the dignity of his office, is not assignable, seems to have been taken for granted in *Arbuthnot* v. *Norton* (*r*), which case, however, was held not to fall within the principle. There Sir John Norton, a puisne Judge of the Supreme Court at Madras, assigned a sum "equal to the amount of six months' salary," directed by 6 Geo. 4, c. 85, to be paid to the "legal personal representatives" of such Judge, in case he shall die in and after six months' possession of office. It was held by the Judicial Committee of the Privy Council that the assignment was valid, not being within the 5 & 6 Edw. 6, c. 16, and 49 Geo. 3, c. 126.

A distinction has been drawn between half-pay and a retiring pension; the first is inalienable even at common law and therefore not seizable (*s*), but a retiring pension, unless made inalienable by statute, is, it seems, alienable, and seizable (*t*), *e.g.*, the pension of a County Court Judge (*u*), or of a person who held an appointment in the legal department in the Government (*x*). And the pension of a retired Judge of a Crown Colony, granted by the Secretary of State for the Colonies, and voted annually by the Legislature of the colony, vests in the creditor's trustee on his bankruptcy (*y*). So also, the pension of a covenanted member of the Indian Civil

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(*m*) *Stone* v. *Lidderdale*, 2 Anst. 533; *M'Carthy* v. *Goold*, 1 Ball & B. 389; *Collyer* v. *Fallon*, Turn. & R. 459, 474. As to the limits of this doctrine see *Hamilton* v. *Coningham*, [1903] 2 Ir. R. 564.

(*n*) *Cooper* v. *Reilly*, 2 Si. 560.

(*o*) *Palmer* v. *Bate*, 6 Moor. 28; cf. *Hill* v. *Paul*, 8 Cl. & Fin. 295.

(*p*) *Gathercole* v. *Smith*, 17 Ch. D. 1; but in the case of a bankruptcy, see Bankruptcy Act, 1914, s. 50, sub-s. 2; Williams, Bankruptcy (13th ed.), p. 328.

(*q*) *Re Mirams*, [1891] 1 Q. B. 594.

(*r*) 5 Moore, P. C. 219; see *per* Dr. Lushington, at p. 230.

(*s*) *Flarty* v. *Odlum*, 3 T. R. 681; *Lidderdale* v. *Montrose*, 4 T. R. 248; cf. *Wells* v. *Foster*, 8 M. & W. 149.

(*t*) *Dent* v. *D.*, L. R. 1 P. & D. 366. See the observations of Lord Esher, M.R., on this case in *Lucas* v. *Harris*, 18 Q. B. D., p. 138.

(*u*) *Willcock* v. *Terrell*, 3 Ex. D. 323; cf. *Manning* v. *Mullins*, [1898] 2 I. R. 34.

(*x*) *Sansom* v. *S.*, 4 P. D. 69; *Wells* v. *Foster*, 8 M. & W. 149; and *McCreery* v. *Bennett*, [1904] 2 I. R. 69.

(*y*) *Ex p. Huggins*, 21 Ch. D. 85.

Ryall v. Rowles.

Service is assignable (*z*). But in *Birch* v. *B.* (*a*) the pension was inalienable by virtue of the Army Act, 1881, s. 141, and therefore could not be taken in execution (*b*).

Money paid by an insurance committee to a panel doctor under an agreement made in accordance with the provisions of the National Insurance Acts, 1911 and 1913, is not money paid to ensure the performance of a public duty, and may therefore be attached (*c*).

A pension given as a perpetual memorial of national gratitude for public services is inalienable : see *Davis* v. *Marlborough* (*d*), where it was held by Eldon, L.C., that the pension granted by 5 Anne, c. 4, " for the more honourable support of the dignities " of the Duke of Marlborough and his posterity, payable out of the revenues of the post-office, was inalienable (*e*).

Where no particular services are to be rendered to the public, an assignment of an interest or pension, though derived from the Crown or the public, will be valid. In the principal case of *Row* v. *Dawson* (p. 87, *supra*), Hardwicke, C., entertained jurisdiction on the ground that the officer admitted the money to be in his house for the use of the person under whom the litigating parties made their claim (*f*). Prize-money is assignable in equity before any interest vests by grant from the Crown (*g*). A pension, granted by Government in compensation for the loss of a place in the Customs, is assignable (*h*).

In *Grenfell* v. *The Dean, etc., of Windsor* (*i*), a canon of Windsor granted the canonry emoluments to secure a sum of money. There was no cure of souls, and the only duties were residence within the Castle, and attendance in the chapel, twenty-one days in the year. Langdale, M.R., held that the security was valid.

(*z*) *Knill* v. *Dumergue*, [1911] 2 Ch. 199.

(*a*) 8 P. D. 163.

(*b*) See *per* Lindley, L.J., in *Lucas* v. *Harris*, 18 Q. B. D., pp. 135, 136; and see *Crow* v. *Price*, 22 Q. B. D. 429. The Army Act, 1881, s. 141, and the Indian Pensions Act, 1871, ss. 11 and 12, make all pensions, to which those Acts refer, inalienable; but see Bankruptcy Act, 1914, s. 51, and *Re Saunders*, [1895] 2 Q. B. 424; *Re Ward*, [1897] 1 Q. B. 266.

(*c*) *O'Driscoll* v. *Manchester Insurance Committee*, [1915] 1 K. B. 811; [1915] 3 K. B. 499.

(*d*) 1 Swans. 74.

(*e*) Cf. *Grenfell* v. *The Dean, etc., of Windsor*, 2 B., at p. 550.

(*f*) Cf. *Priddy* v. *Rose*, 3 Mer. 103.

(*g*) *Alexander* v. *Wellington*, 2 Russ. & M. 35.

(*h*) *Tunstall* v. *Boothby*, 10 Si. 542.

(*i*) 2 B. 544.

Ryall v. Rowles.

Bankruptcy.—By the Bankruptcy Act, 1914, s. 51, it is provided (in effect) that where a bankrupt is an officer of the army or navy, or employed in the Civil Service, the trustee is to receive for distribution among the creditors so much of the bankrupt's pay or salary as the Court, with the consent of the chief officer of the Department, may direct. And where a bankrupt is in receipt of a salary or income other than as aforesaid, or is entitled to any half pay or pension, or to any compensation granted by the Treasury, the Court is to make such order as it thinks just for the payment of the salary, income, half pay or pension, or any part thereof, to the trustee. In *Hollinshead* v. *Hazleton* (*k*), it was held that where a bankrupt is a member of the House of Commons the Court may make an order appropriating, for the benefit of his creditors, a portion of his salary as a member.

Alimony.—Alimony granted to a wife by the Divorce Court is not assignable, inasmuch as it is a mere allowance which, having regard to the means of the husband and wife, the Court thinks ought to be paid from time to time for her maintenance, and the Court may alter it or take it away when it pleases (*l*).

A weekly sum ordered by a Court of summary jurisdiction to be paid by a husband to his wife for her maintenance in accordance with section 5 of the Summary Jurisdiction (Married Women) Act, 1895, is inalienable (*m*).

Agreements affecting the Administration of Justice.—An assignment of property, in consideration of stifling a prosecution (even abroad), is void (*n*), and so is an assignment of shares as indemnity for bail (*o*).

Maintenance and Champerty.—Maintenance is "where any man gives or delivers to another, that is plaintiff or defendant in any action, any sum of money or other thing to maintain his plea, or takes great pains for him, when he has nothing therewith to do" (*p*).

The rules are founded on considerations of public policy "that parties shall not by their countenance aid the prosecution of suits

(*k*) [1916] 1 A. C. 428.

(*l*) *Re Robinson*, 27 Ch. D. 160, 164; *Smith* v. *S.*, [1923] P., pp. 199, 204.

(*m*) *Paquine* v. *Snary*, [1909] 1 K. B. 688.

(*n*) *Kaufman* v. *Gerson*, [1904] 1 K. B. 591.

(*o*) *Consolidated, etc., Finance Co.* v. *Musgrave*, [1900] 1 Ch. 37; cf. *Prince* v. *Howarth*, [1905] 2 K. B. 768; *Savill* v. *Langman*, 14 T. L. R. 504.

(*p*) Termes de la Ley, cited in E. B. & E., at p. 825; see *Bradlaugh* v. *Newdegate*, 11 Q. B. D., at p. 5. For the old cases, see Vin. Abr. tit. "Maintenance."

of any kind, which every person must bring upon his own bottom and at his own expense" (*q*); "no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce" (*r*).

Three consequences flow from maintenance: a criminal prosecution (*s*); a civil action for damages (*t*); and the nullity of every agreement or assignment tainted with it. Improperly assisting in a criminal prosecution is not maintenance (*u*).

Of the three kinds of maintenance, viz., Maintenance in its limited sense (where only assistance is given), Embracery, and Champerty (*x*), only the last-named is dealt with in this note.

Champerty is "the unlawful maintenance of a suit in consideration of a bargain either for part of the thing or some profit out of it" (*y*). It is said to be derived from *campi partitio* (*z*). If the interference does not amount to maintenance, then there is no champerty, although the party rendering assistance is to derive benefit therefrom (*a*). It is not essential that there shall be a hostile action to recover the property or any action at all (*b*). A trade union has no legal common interest in a slander action brought by one of its officers, although slandered by way of his office; and payment of the officer's costs by the union, therefore, offends the law against maintenance (*c*).

An agreement merely to communicate information in return for a share of the property recovered (if successful) is not champertous, but if the person to give the information agrees himself to recover the property or actively assist in its recovery, then the agreement is champertous and void (*d*). But agreements

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(*q*) *Wallis* v. *Portland*, 3 V., at p. 502.

(*r*) *Prosser* v. *Edmonds*, 1 Y. & C. Ex., at p. 497; and see generally on maintenance, *Neville* v. *London Express Newspapers, Ltd.*, [1919] A. C. 368.

(*s*) Hawk., P. C., ed. (1795), vol. ii, pp. 393 *et seq.*

(*t*) *Bradlaugh* v. *Newdegate*, *supra.*

(*u*) *Grant* v. *Thompson*, 72 L. T. 264.

(*x*) *James* v. *Kerr*, 40 Ch. D., at p. 456.

(*y*) *Stevens* v. *Bagwell*, 15 V., at p. 156.

(*z*) *Radcliffe* v. *Anderson*, E. B. & E., at p. 825; *Guy* v. *Churchill*, 40 Ch. D. 481; Anon., 1 Ch. D. 573.

(*a*) *Williams* v. *Protheroe*, 3 Y. & J. 129; Addison, Contracts (11th ed.), p. 80; *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co.*, [1908] 1 K. B. 1006.

(*b*) *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

(*c*) *Oram* v. *Hutt*, [1913] 1 Ch. 259; [1914] 1 Ch. 98.

(*d*) *Rees* v. *De Bernardy*, *supra; Hartley* v. *Russell*, 2 Si. & Stu. 244; *Wedgerfield* v. *De Bernardy* (1908), 24 T. L. R. 497.

merely collateral are not tainted (*e*). Many of the defences available in an action of maintenance will not support a champertous assignment, *e.g.*, common interest (*f*), interest arising from consanguinity or affinity (*g*), or interest arising between master and servant (*h*), or charity (*i*), or the legitimate defence of trade interests (*k*), for, however they may excuse mere assistance, they are rebutted by the fact that the consideration is a share of the proceeds or some profit from it (*l*).

An assignment of a share of prize-money, the subject of a suit then depending in the Admiralty Court, to navy agents in consideration of an indemnity against all costs on account of any suit has been held void on the ground of champerty (*m*). The purchase of an estate for the purpose of setting aside a previous agreement affecting the property on the ground of fraud partakes of the nature of champerty and will not be enforced in equity (*n*). So, too, the assignment of a bare right to file a bill in equity for a fraud on the assignor (*o*); or of a right to sue a trustee for the recovery from him of interest on or profits of part of the trust funds which were for a certain period in his hands (*p*); or by a creditor of a company, who has presented a petition to wind it up, of his debt *and* the right to proceed with the petition (*q*), is void. The mere purchase (*r*), or mortgage (*s*) of the subject-

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(*e*) *Re Thomas*, [1894] 1 Q. B. 747.

(*f*) As to which see *Alabaster* v. *Harness*, [1895] 1 Q. B. 339; *British Cash and Parcel Conveyors, Ltd.* v. *Lamson Store Service Co.*; *Oram* v. *Hutt*, *supra*.

(*g*) *Burke* v. *Greene*, 2 Ball & B. 521; *Moore* v. *Fisher*, 7 Si. 384; and see *Hutley* v. *H.*, L. R. 8 Q. B. 112.

(*h*) *Wallis* v. *Portland*, 3 V., at p. 503; *Eborough* v. *Ayres*, L. R. 10 Eq. 371, 375.

(*i*) See *Harris* v. *Brisco*, 17 Q. B. D. 504; *Holden* v. *Thompson*, [1907] 2 K. B. 489.

(*k*) *British, etc.*, v. *Lamson, etc., Co.*, [1908] 1 K. B. 1006; *Oram* v. *Hutt*, [1913] 1 Ch. 259; [1914] 1 Ch. 98.

(*l*) See *Hutley* v. *H.*, L. R. 8 Q. B. 112, 117.

(*m*) *Stevens* v. *Bagwell*, 15 V. 139; and see also *Skapholme* v. *Hart*, Cas. t. Finch, 477; *Strachan* v. *Brandon*, 1 Eden, 303; *Wood* v. *Downes*, 18 V. 120, 123; *Bayly* v. *Tyrrell*, 2 Ball & B., at p. 362; *Earle* v. *Hopwood*, 9 C. B. (N.S.) 566.

(*n*) *De Hoghton* v. *Money*, L. R. 2 Ch. 164.

(*o*) *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481. See also *Powell* v. *Knowler*, 2 Atk. 226; *Twiss* v. *Noblett*, 4 Ir. R. Eq. 64; *Keogh* v. *McGrath*, 5 L. R. Ir. 478.

(*p*) *Hill* v. *Boyle*, L. R. 4 Eq. 260, 263.

(*q*) *Re Paris Skating, etc., Co.*, 5 Ch. D. 959; Leake (7th ed.), 540; Pollock (9th ed.), 412.

(*r*) *Williams* v. *Protheroe*, 5 Bing. 309; *Wood* v. *Griffith*, 1 Swans. 56; *Knight* v. *Bowyer*, 2 De G. & J. 421.

(*s*) *Cockell* v. *Taylor*, 15 Beav. 103.

matter of a suit, *pendente lite*, is not invalid; but a purchase in order to maintain a suit relating to the property is void (*t*). The rule is that "the sale of an interest to which a right to sue is incident is good, but the sale of a mere right to sue is bad" (*u*). So that where a legatee, too poor to sue, assigned the legacy for less than it was worth to the plaintiff, who bought it with the intention of enforcing payment by suit, the transaction was upheld (*x*). The fact that the purchase of debts was made with an ulterior motive—*e.g.*, to procure an adjudication in bankruptcy against the debtor and his removal from the directorate of a company—does not affect its validity (*y*). Where, however, the interest is purchased *pendente lite* by the assignor's solicitor the assignment is invalid (*z*). Where a claimant borrowed money from a solicitor in order to conduct his defence in an action, and, as security, mortgaged the subject-matter of the action and covenanted to employ a particular solicitor, if successful, and to pay a bonus, he was held entitled to redeem (on the action resulting in his favour) on payment of the sums actually advanced (*a*). The rule, however, does not apply to an assignment by way of security, *e.g.*, for costs (*b*), nor to an assignment to the solicitor after a Judge's order for payment, for the order puts an end to the litigation (*c*).

The statutory provisions (*d*) which regulate agreements between solicitors and clients as to their remuneration do not affect the law relating to champerty (*e*). On bankruptcy the rights of a person injuriously affected by maintenance or champerty pass to his trustee, and consequently the bankrupt cannot sue unless the

(*t*) *De Hoghton* v. *Money*, L. R. 2 Ch. 164; *Prosser* v. *Edmonds*, 1 Y. & C. Ex. 481; *Harrington* v. *Long*, 2 My. & K. 590.

(*u*) See Pollock (9th ed.), 411; *Wilson* v. *Short*, 6 Ha. 366; *Dickinson* v. *Burrell*, L. R. 1 Eq. 337; *Cook* v. *Field*, 15 Q. B. 460; *Ellis* v. *Torrington*, [1920] 1 K. B. 399.

(*x*) *Tyson* v. *Jackson*, 30 Beav. 384.

(*y*) *Fitzroy* v. *Cave*, [1905] 2 K. B. 364.

(*z*) *Wood* v. *Downes*, 18 V. 120; *Kenney* v. *Browne*, 3 Ridg. P. C. 462, 498, 501; *Simpson* v. *Lamb*, 7 E. & B. 84; *Hall* v. *Hallett*, 1 Cox, 134; *Reynell* v. *Sprye*, 8 Ha. 222; *Sprye* v. *Porter*, 7 E. & B. 58; *Strange* v. *Brennan*, 15 Si. 346; *Earle* v. *Hopwood*, 9 C. B. (N.S.) 566. Cf. *Davis* v. *Freethy*, 24 Q. B. D. 519.

(*a*) *James* v. *Kerr*, 40 Ch. D. 449.

(*b*) *Anderson* v. *Radcliffe*, 28 L. J. Q. B. 32.

(*c*) *Smith* v. *Selwyn*, 5 W. R. 682.

(*d*) Attorneys Act, 1870, ss. 4 and 11; Solicitors' Remuneration Act, 1881, s. 8, and the Orders made thereunder.

(*e*) *Re Attorneys Act*, 1870, 1 Ch. D. 573; *Davis* v. *Freethy*, 24 Q. B. D. 524; *Re a Solicitor*, [1912] 1 K. B. 302, 312.

Ryall v. Rowles.

adjudication is set aside (*f*). The assignment by a trustee in bankruptcy of the subject-matter of an action he has commenced is outside the rules of maintenance and champerty (*g*).

An agreement for a pecuniary consideration by a shareholder in a company, in compulsory liquidation, that he would endeavour to postpone the making of a call or would support the claim of a creditor, is void, both as infringing the policy of the Winding-up Acts and also as constituting maintenance (*h*). A general assignment of all assets by the liquidator of a company passes claims for misfeasance against directors under section 151 of the Companies (Consolidation) Act, 1908, as choses in action, even though the facts constituting the claims were unknown at the time of the assignment (*i*), in spite of the transaction being an assignment of a mere right of action.

An agreement by an heir-at-law and devisee, both out of possession, where it is doubtful in which of them the right is vested, that they shall jointly recover the estate from the person in possession and divide it between them is void as contrary to the policy of the law (*k*), each alone being competent to make a composition with the person in possession, but not with any one else (*l*). This decision was based on the common law as well as the statute 32 Hen. 8, c. 9, and it is doubtful how far it is affected by the repeal of that statute (*m*). An heir-at-law may lawfully maintain the title of the person in possession (*n*), and the sale of a mere contingent right or expectancy, not being an adverse claim, is valid (*o*).

As to assignments of choses in action by alien enemies, see Trading with the Enemy Amendment Act, 1914, s. 6, and the further amending Act of 1915, s. 3.

(*f*) *Metropolitan Bank* v. *Pooley*, 10 A. C. 210; *Whitworth* v. *Hall*, 2 B. & Ad. 695.

(*g*) *Seear* v. *Lawson*, 15 Ch. D. 426; *Guy* v. *Churchill*, 40 Ch. D. 481.

(*h*) *Elliott* v. *Richardson*, L. R. 5 C. P. 744; *Lound* v. *Grimwade*, 39 Ch. D. 613.

(*i*) *Re Park Gate Co.*, 17 Ch. D. 234; *Wood* v. *Woodhouse and Rawson United*, [1896] W. N. 4.

(*k*) *Cholmondeley* v. *Clinton*, 4 Bli. 1; Sugd. Prop. 74.

(*l*) See *per* Lord Redesdale at p. 123.

(*m*) Land Transfer Act, 1897, s. 11.

(*n*) See *per* Rigby, L.J., in *Alabaster* v. *Harness*, [1895] 1 Q. B., at p. 346.

(*o*) *Cook* v. *Field*, 15 Q. B. 460; Pollock on Contracts (9th ed.), p. 415.

HORNSBY *v.* LEE.

1816. 2 Madd. 16.

Assignment of Wife's Choses in Action.—Reduction into Possession.

Husband and wife assign a reversionary interest of the wife in certain trust stock, as security for the payment of an annuity granted by the husband, the husband afterwards takes the benefit of the Insolvent Debtors Act, and a general assignment is made of his property. The person on whose death the wife was to take dies, and then the husband dies without having done any other act to reduce the stock into possession. Held, that the wife was entitled by survivorship to the stock against both the particular and the general assignee.

By indenture, January 1, 1774, between Deacon and Collier, assignees of Baptist Darwin, a bankrupt (the father of the plaintiff), of the first part; the said Baptist Darwin and S. Darwin, his wife (the mother of the plaintiff), of the second part; and Mary Petty, R. Petty, J. Elliott, and G. Hooper, of the third part, Deacon and Collier granted, etc., unto the said M. Petty, R. Petty, J. Elliott, and G. Hooper, £422 6s. 3d. Four per Cents., together with the dividends, to hold the same upon trust, to apply the dividends for the separate use of S. Darwin during her life, and after her death, to apply the principal and dividends among all and every such child and children of the said B. Darwin by the said S. Darwin, as should be then living, in equal shares, payable at twenty-one; but if either of the children should die before his or her or their shares should become payable, the shares of him, her, or them so dying, to be paid to the survivors; and if only one child who should live to attain twenty-one, then the principal sum and the dividends to be paid to such only child. By the same indenture, Deacon and Collier granted, etc., to the said M. Petty, R. Petty, J. Elliott, and G. Hooper, certain shares in a messuage, and all the assignee's right, title, and interest in, and to the real estate late of Richard Petty (the father of the said S. Darwin), and the moiety, or half part of the share and proportion of them, the said assignees, of, in, and

to a certain sum of £2,762 11s. 3d. upon the same trusts as were declared respecting the £422 6s. 3d. Four per Cents.

The plaintiff and Anne Mary Darwin were the only issue of Baptist and Sarah Darwin. Baptist Darwin died in 1782. In 1787, the plaintiff married Nathaniel Hornsby, without a settlement, and in February, 1799, *the plaintiff and her husband assigned over a moiety of their interest in the said trust funds*, upon the contingency of the plaintiff surviving her mother, unto the defendant John Parker, as a collateral security for the due payment of an annuity of £30 granted by the plaintiff's husband, Hornsby, to Parker during his life, in consideration of £200 paid to Hornsby.

In 1790, Anne Mary Darwin married John Patten.

In 1801, Thomas Rolph and the defendant George Lee were appointed trustees, and the trust moneys, which then consisted of £1,453 15s. 6d. £3 per Cents., were transferred to them.

Anne Mary Patten died in 1807, and Sarah Darwin (the mother) died early in February, 1814 (*a*).

The plaintiff's husband, Hornsby, was confined in the King's Bench Prison for debt, and in January, 1814, was discharged under the Insolvent Act, and his estate and effects vested in a clerk of the peace, and the same were by him assigned to the defendant John Seton.

Hornsby afterwards, February 16, 1814, died without having instituted any proceedings, or done any act to reduce the trust fund into possession, in the short interval—a few days only—between the widow's death and his own.

Thomas Rolph died March 24, 1814.

The bill stating these facts prayed, that the trust funds, with the dividends, might be transferred to the plaintiff; or if the Court should be of opinion that the defendants Parker and Seton, or either of them, were entitled to them, then that the plaintiff might be decreed to have a settlement out of the same.

The defendant Parker, by his answer, insisted that the dividends and interest of the moiety of the trust moneys assigned to him ought to be applied pursuant to the trusts declared as to the

(*a*) The particular day of her death does not appear on the pleadings.

same, in and by the indenture of February 26, 1799, and stated, that £314 3s. 6d. was due to him for ten years and a half arrears of the annuity, and claimed to be paid the same out of the trust moneys.

The defendant Seton, by his answer, submitted that the trust founds ought to be transferred to him as the assignee of the estate and effects of Hornsby, for the benefit of himself and the rest of the creditors.

The defendant Lee, the trustee, submitted to act as the Court should direct.

Mr. Cooke and Mr. Richards, for the plaintiff.—The plaintiff claims the whole of this property, as having survived to her. This being a reversionary interest, the husband could not reduce it into possession, or part with it before the death of Sarah Darwin, the mother; and after her death, a few days before his own, he did no act to reduce the property into possession. Neither the particular assignment to Parker, nor the general assignment under the Insolvent Act to Seton, operated as a reduction into possession. In *Mitford* v. *M.* (*b*) it was determined, that the general assignment in bankruptcy had not the effect of reducing into possession a legacy of stock left in trust for the benefit of the bankrupt's wife, and her right by survivorship was established against the assignees. The same principle must apply to all assignments, whether under the Insolvent Debtors Act or to a particular assignee. They cited also *Wildman* v. *W.* (*c*), and *Woollands* v. *Crowcher* (*d*).

The plaintiff, by joining in the assignment to Parker, has not affected her claim; for being a married woman, the deed was inoperative as to her.

Mr. Leach and Mr. Dowdeswell, for the defendant Parker.—The assignment to Parker of this reversionary interest, as a security for the payment of the annuity granted to him, was valid. In *Wright* v. *Morley* (*e*) an assignment by the husband of his interest, in right of his wife, was held good, subject to

(*b*) 9 V. 87. (*c*) 9 V. 174.
(*d*) 12 V. 174. (*e*) 11 V. 12.

the wife's equity to a settlement. That, it is true, was a present interest; but whether the interest to which the husband is entitled in right of his wife be present or reversionary, makes no difference. In both cases his assignment is effectual, subject to the wife's equity to a settlement.

Mr. Trower, for the defendant Seton.—After the determination in *Mitford* v. *M.* (*f*), I cannot contend that this interest passed by the assignment under the Insolvent Debtors Act; but this defendant, not having asserted any right to this property, and being made a party against his desire, ought to have his costs.

Mr. Shadwell, for the trustee, asked for his costs.

Sir Thomas Plumer, V.-C., E.—[After stating the facts of the case.] Independently of authority, let us consider, upon principle, whether the husband's assignment of his wife's contingent interest is good. The husband has a right to his wife's choses in action, provided he reduces them into possession? Is a deed assigning a reversionary interest a reduction into possession? It is impossible actually to reduce a reversionary interest into possession. Is it then a constructive reduction into possession? *The assignment puts the assignee of the husband in the same situation as the husband*, and if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife, and the assignee therefore is not entitled to the property. This is the manner in which the case strikes me upon principle.

According to *Mitford* v. *M.* (*f*), it is clear, that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her husband. It must be the same as to the assignment under the Insolvent Debtors Act. Nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woollands* v. *Crowcher* (*g*) is strong to show the insuffi-

(*f*) 9 V. 87.

(*g*) 12 V. 174.

ciency of the assignment to bar the wife's claim in case she survives her husband. On principle and authority the plaintiff is entitled to this money.

NOTES.

1. Generally.
2. Reduction into possession, p. 163.
3. Chose in action of a married married—How far assignable, p. 164.

1. Generally.

The rule of law stated in the principal case has ceased to be of much importance, and will accordingly be treated in these notes more briefly than in previous editions. Where the marriage took place after January 1, 1883, choses in action, whether belonging to the wife at the date of her marriage or acquired by her thereafter, are separate estate under the Married Women's Property Act, 1882. Where the date of marriage was prior to that Act, choses in action her title to which, whether vested or contingent, and whether in possession or reversion, accrued to her in possession or reversion after the commencement of that Act, are also separate estate thereunder. By the construction put upon the Act in *Reid* v. *R.* (*h*) choses in action the title to which accrued in reversion prior to January 1, 1883, are not separate estate within the Act, though the title in possession accrues after that date.

The Old Law as to the wife's choses in action before 1883.—Marriage operated as a qualified gift to the husband of choses in action present and reversionary which did not belong to the wife for her separate use—the husband acquired them on the condition that he reduced them into possession during the continuance of the marriage (*i*); if not so reduced they belonged to the wife if she survived her husband (*k*).

Marriage by operation of law divested the property in chattels personal out of the wife. In the case of a chose in action, marriage did not divest the property out of the wife, and all that the

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(*h*) 31 Ch. D. 402.

(*i*) *Purdew* v. *Jackson*. 1 Russ. 1.

(*k*) Co. Litt. 351a; *Scawen* v. *Blunt*, 7 V. 294; *Langham* v. *Nenny*, 3 V. 467; *Re Butler's Trusts* (1888), 38 Ch. D. 286.

husband acquired by the marriage was a *right* to reduce the chose in action into possession (*l*). But at any time before the husband had actually reduced the equitable interest into possession, the wife might, if the chose in action were a present interest, assert her equity to a settlement (*m*).

If the husband survived his wife, on taking out administration he was entitled to her choses in action, not reduced into possession (*n*).

2. Reduction into Possession.

In order to reduce a wife's choses in action into possession, acts must be done which will have the effect of changing the property therein, and divesting the wife's right. For nothing amounts to a reduction into possession which does not give the husband, for some moment of time, *absolute* dominion over the property without any concurrence of the wife (*o*).

The receipt, however, by the husband of his wife's chose in action, as, for instance, of a sum due to her on a mortgage in fee, will be a reduction thereof into possession (*p*), unless such receipt by the husband be in the character of trustee, when it will not have that effect (*q*).

And as a husband may, by transferring his wife's stock into his own name, reduce it into possession, so he may do so by transferring it into the names of trustees upon trusts inconsistent with his wife's title by survivorship (*r*).

A sale by a husband for a sum of money of his wife's share in certain chattels, which chattels were taken possession of by the purchaser, was held to amount to a reduction into possession by the husband if reduction was necessary in such a case (*s*).

Administration by Husband.—If a husband failed to reduce his wife's choses in action into possession during her lifetime, he would upon her death before him, be entitled to them on taking out administration. If the husband died without having taken

(*l*) See judgment of Bowen, L.J., *Re Butler's T.*, 38 Ch. D., p. 294; and see *Re Barton's Will*, 10 Ha. 12.

(*m*) As to which, see *Elibank* v. *Montolieu*, and notes, *post*.

(*n*) Williams on Executors (11th ed.), 652.

(*o*) *Nicholson* v. *Drury, etc.*, 7 Ch. D., p. 55. See *Aitchison* v. *Dixon*, 10 Eq., p. 589; Williams, *supra*.

(*p*) *Rees* v. *Keith*, 11 Si. 388, 390.

(*q*) *Baker* v. *Hall*, 12 V. 497; *Wall* v. *Tomlinson*, 16 V. 413.

(*r*) *Hansen* v. *Miller*, 14 Si. 22; *Burnham* v. *Bennett*, 2 Coll. Ch. R. 254.

(*s*) *Widgery* v. *Tepper*, 5 Ch. D. 516; 7 Ch. D. 423.

out administration, his personal representative, upon taking out administration to the wife, became entitled to such choses in action (*t*). If probate be granted of the wife's will, the executors will be merely trustees of the beneficial interest in her choses in action for her husband surviving her, and he, or if he is dead his legal personal representatives, may sue the executors in respect of them (*u*).

3. Chose in Action of a Married Woman—How far Assignable.

A husband can give no better right to another than he has himself; therefore all assignments made by the husband of the wife's choses in action, present or reversionary, vested or contingent, which are not, or cannot be, then reduced into possession, whether the assignment be in bankruptcy, or to trustees for payment of debts, or to a purchaser for valuable consideration, even although the wife joins therein, pass only the interest which the husband himself has, and are therefore subject to the wife's legal right by survivorship.

The result of the principal cases (*x*) may be stated shortly thus: The assignment, although by the husband and wife, puts the assignee in the same situation as the husband. If the chose in action is not reversionary, the claim of the assignee is liable to be defeated either by the wife's equity to a settlement (*y*), or by her right of survivorship, until the chose is reduced into actual possession. If the chose is reversionary, and the wife survives her husband, she necessarily takes by survivorship, and the assignee take nothing, but if the husband in such case survives the wife, the husband will become entitled on taking out administration, and through him his assignee.

Where personalty, a reversionary interest in which is given to a married woman, is brought into existence for the purpose of securing a loan to her husband, the assignment by the husband and wife with the object of effecting such security will, *pro tanto*, defeat the wife's right by survivorship. Thus, in *Winter* v.

(*t*) *Partington* v. *Att.-Gen.*, L R. 4 H. L., at p. 109; *In the goods of Harding*, L. R. 2 P & D. 394; *of Roberts*, [1898] P. 149.

(*u*) *Smart* v. *Tranter*, 43 Ch. D. 587; *cf. Elliot* v. *North*, [1901] 1 Ch. 424.

(*x*) See *Hornsby* v. *Lee*, *supra*; *Purdew* v. *Jackson*, 1 Russ. 1; *Honner* v *Morton*, 3 Russ. 65; *Box* v. *B.*, Dru. 42; *Box* v. *Jackson*, 1 Dru. 48; *Prole* v. *Soady*, L. R. 3 Ch. 220; *Wilkinson* v. *Gibson*, 4 Eq. 162; *Widgery* v. *Tepper*, 7 Ch. D. 423; *Re Butler's T.*, 3 L. R. Ir. 89.

(*y*) See *Elibank* v. *Montolieu*, *post*.

Hornsby v. Lee.

Easum (*z*), a married woman entitled to income for her separate use agreed to assist her husband in obtaining a loan from an insurance company. A policy was accordingly effected with the company, by which a sum was assured to the survivor of the husband and wife upon the death of the one first dying. By a mortgage deed of the same date, reciting an agreement for a loan by the office at the request of the husband and wife, the wife assigned her separate income, and the husband the policy by way of mortgage for securing the sum advanced by the company. By the same deed the husband and wife, the wife joining for the purpose of binding her separate estate, covenanted that the husband would pay the premiums on the policy; and there was a declaration by the husband alone that if he did not pay them the mortgagees might pay them out of income, and a declaration by all parties that if the policy moneys became payable before the mortgage was paid, the company might pay it out of those moneys. After the death of the husband the wife claimed the moneys payable under the policy as being a chose in action not settled to her separate use, and therefore incapable of being effectually assigned during the husband's life. It was held that, although the policy if taken alone created an interest in the wife not capable of being assigned so as to bar her right by survivorship, yet as it had been created for the purpose of a mortgage, and as a part of the same transaction, and in pursuance of a contract that it should be a security to the company, the wife's interest was included in the security (*a*).

Although a Court of equity will not give effect to an assignment by the husband of his wife's reversionary chose in action, so as to defeat her legal right by survivorship, it will be good against him if he survive his wife (see the principal case). And when it becomes an interest *in possession* it will be subject to the wife's equity to a settlement (*b*).

A married woman, who has obtained a decree for a judicial separation from her husband is entitled absolutely, under 20 & 21 Vict. c. 85, s. 25, and 21 & 22 Vict. c. 108, s. 8, to her *choses in action* not reduced into possession, although she may have

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(*z*) 2 De G. J. & S. 272.

(*a*) See also *Stamford, etc., Banking Co.* v. *Ball*, 31 L. J. Ch. 143.

(*b*) See *Greedy* v. *Lavender*, 13 B. 62; *Clarke* v. *Woodward*, 25 B. 455; and note to *Elibank* v. *Montolieu*, *post*.

previously joined her husband in a mortgage thereof (*c*); and if the husband appears to oppose the application of his wife, he will be refused costs (*d*).

The same result follows when there has been a decree for the dissolution of marriage, for after the dissolution there is no right in the husband, whose right to reduce into possession only exists during the coverture (*e*).

Domicil.—Where a married woman, domiciled abroad, is entitled to reversionary interests in personalty, her rights or powers over such interests, and the rights of her husband, will be regulated by the law of the domicil (*f*).

20 & 21 Vict. c. 57 (Malins' Act).—This Act enabled a married woman, in certain cases, to dispose of reversionary interests in personal estate not settled to her separate use by deed acknowledged in which her husband concurred. The necessity for acknowledgment has been removed by the Law of Property Act, 1925, s. 167.

(*c*) *Re Insole*, 1 Eq. 470; cf. *Re Hughes*, [1898] 1 Ch. 529.

(*d*) *Johnson* v. *Lander*, 7 Eq. 228.

(*e*) *Prole* v. *Soady*, L. R. 3 Ch. 220; *Heath* v. *Lewis*, 4 Gif. 665; *Swift* v. *Wenman*, 10 Eq. 15; *Seaton* v. *S.*, 13 A. C. 61; *Fitzgerald* v. *Chapman*, 1 Ch. D. 563.

(*f*) *Guepratte* v. *Young*, 4 De G. & S. 217; *Duncan* v. *Cannan*, 18 B. 128; 7 De G. M. & G. 78.

BOUNDARIES.

WAKE *v.* CONYERS.

1759. 1 Eden, 331 (*a*).
1759. Reg. Lib. Min. Trin.

Boundaries.

All cases where the Court has entertained bills for establishing boundaries have been where the soil itself was in question, or there might have been a multiplicity of suits.

The Court has no power as of course to issue commissions to fix the boundaries of legal estates. Some equity must be superinduced by the acts of the parties, as some particular circumstances of fraud; or confusion, where one party has ploughed too near the other, or the like.

Bill to ascertain the boundaries of two manors dismissed, there being no dispute as to the soil.

The defendants, John Conyers, Esq., as tenant for life, his wife, Lady Henrietta, as entitled after his death to her jointure, and his son, an infant, as tenant in tail, were entitled to the manor of Epping, and also to the freehold of certain lands next adjoining to it, lying in the manor of Waltham; the boundary lines of the two manors passing through Mr. Conyers' park. He had cut down certain trees which, it was alleged by the bill, were standing on the line, and were boundary marks.

The present bill was filed by Sir William Wake, as prochein amy to his three infant sons, who were tenants in tail successively of the manor of Waltham, praying that the boundary of the manor of Waltham, so far as the same abuts on the manor of Epping, might be fixed and set out, and that a commission might issue for that purpose; and that the defendant John Conyers might set up new boundary marks in the room of those which he had cut down and destroyed.

(*a*) 2 Cox, 360, Hill's MSS.

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Mr. Conyers by his answer admitted the cutting down of certain trees, but denied that they were boundary marks; though he submitted to have the boundaries ascertained and settled, and that marks might be set up to perpetuate such boundaries.

On the opening, the Lord Keeper (Henley) objected to the nature of the suit, as being merely to settle the boundaries of the manor. He said he did not think the Court had jurisdiction, and desired it to stand over, for counsel to consider whether there was sufficient equity for the Court to entertain the bill.

It came on again this day (*b*).

The Attorney-General (Sir Charles Pratt), Wilbraham, and Browning, for the plaintiffs, cited the authorities and cases mentioned below (*c*).

Perrot and Hoskins, for the defendants.—This bill, under pretence of establishing boundaries, is, in fact, to settle manorial rights. It is said that every question for the settling of boundaries is a proper subject for the jurisdiction of this Court. That is, however, not the case. Those cases which have been cited, in which a man, having joint occupation, has confounded the boundaries, have turned upon the fraud which has been relieved against. A similar principle has given the Court jurisdiction in the cases of rent-charge.

Lord Keeper Henley (*d*).—This bill is merely for ascertaining the boundaries of these two manors, and is intended to bind the inheritance of the parties for ever. It struck me as new upon the opening. I have been, ever since I sat here, extremely jealous of the jurisdiction of this Court over legal inheritances. I was, therefore, desirous that some precedent should be produced to show me that this Court could entertain a bill of this nature, to settle the boundaries of an incorporeal inheritance; but none such has been produced. There have, since I sat here, been several [bills] to fix boundaries where a right to the freehold of

(*b*) June 16, 1759.

(*c*) Tothill, 84, 126, 127, 210; *Bowman* v. *Yeat*, 1 Ch. Ca. 146; *Harding* v. *Countess of Suffolk*, 1 Ch. R. 63; *Cocks* v. *Foley*, 1 Vern. 359; *The Duke of Dorset* v. *Serjeant Girdler*, Pr. Ch. 531.

(*d*) Afterwards Lord Chancellor and Earl of Northington.

the soil has been incidental. But I have seen such frightful consequences arising from them, that I think these suits are very far from deserving encouragement. They originally came into this Court under the equity of preventing multiplicity of suits; yet in those cases I have observed that they have been sometimes attended with more expense than if all the suits which they apprehended, and which they were brought to prevent, had actually been tried at law.

Hitherto these disputes have been only between persons of great fortune. But the consequences have been that the parties have been eager to come into this Court, without any attention being paid to see whether the prayer of the bill applies properly to the jurisdiction. An issue is directed, and after going down to the Assizes, at a very great expense, and a verdict being found for one party, the other is dissatisfied, and a new trial is directed. I was extremely unwilling to grant the last new trial, in the case of *The Earl of Darlington* v. *Bowes* (*e*), but on inquiring of the bar whether there was any instance of a decree made upon one verdict only, none could be produced; and if there were any, they were so few that they could not be remembered. I therefore thought myself bound by the current of opinions to grant it. But I am determined, if any such case should ever come before me again, to consider it in a different light, and to have the matter more fully inquired into, and prevent, if possible, an expense which is a reproach to the law.

All the cases where the Court has entertained bills for establishing boundaries have been where the soil itself was in question, or where there might have been a multiplicity of suits.

The Court has, in my opinion (and if parties are not satisfied, they have resort elsewhere), no power to fix the boundaries of *legal* estates, *unless some equity is superinduced by the act of the parties, as some particular circumstance of fraud; or confusion, where one party has ploughed too near the other, or the like; nor has this Court a power to issue such commissions of course, as here prayed.*

In this case, it is said there is no legal remedy, and therefore

(*e*) 1 Eden, 270.

there must be an equitable one; but this does not follow unless there is an equitable right. If there is a legal right, there must be a legal remedy; and if there is no legal right, there can, in this case, be no equitable one.

It is said, that, in some future time, there may be a casual right such as escheat, treasure trove, etc.; but am I to countenance such a suit as this before there is any such right, merely because it may happen, though when it does happen, it may perhaps be such a right as the parties will not think it worth their while to contend for?

If I were to make this a precedent, it would be, in effect, to issue commissions to settle boundaries all over the kingdom; for if of manors, why not of honours, of hundreds, and all other inferior denominations of districts? I shall always, while I have the honour to sit here, be very attentive to prevent the subject from great waste of expense about matters by no means adequate to it. Should I entertain such a bill as this, I should put it in the power of every opulent lord of a manor to distress, if not ruin, not only a poor man, but even a man of moderate fortune, whose estate happens to border upon his; for these suits are often attended with £2,000 or £3,000 expense—a dishonour to justice.

In order to give this Court jurisdiction, there must appear some equitable circumstances in the case. I know of no boundary marks to a manor in another's soil. The trees were Mr. Conyers' own: he had a right to cut them down; and if the plaintiffs are afraid of losing, in the course of time, the evidence of the boundaries of their manors, they may preserve it by perambulations as often as they please; but I cannot fix the limits of a legal right (if any), unless the jurisdiction of this Court is superinduced by some equitable circumstances, which it is not in this case.

Another consideration is, that the plaintiffs are infants, and so is one of the defendants; and shall I send the infant plaintiffs beforehand, when they know not the value of their estate, to bind the inheritance *quia timet*, under the protection of the father, who is not privy in estate to them? I am well satisfied that this bill ought to be dismissed.

NOTES.

1. Generally.
2. Cases in which a commission has been issued, or an issue directed, p. 172.

1. Generally.

The jurisdiction of the Court to issue a commission to ascertain boundaries is very ancient (*f*), but its origin is by no means free from doubt.

The Lord Keeper, in the principal case, was of opinion, that suits to determine boundaries originally came into the Court of Chancery under the equity of preventing multiplicity of suits; but Grant, M.R., in a case where it became necessary to inquire by what principles the Court is guided in granting a commission of this description, observes, that "there are two writs in the register, concerning the adjustment of controverted boundaries, from one of which it is probable that the exercise of this jurisdiction by the Court of Chancery took its commencement. The first is the writ *de rationalibus divisis* (*g*); the other, the writ *de perambulatione facienda* (*h*). Both Lord Northington and Lord Thurlow, without referring to this writ or commission as the origin of the jurisdiction of the Court, have yet expressed an opinion, that *consent* was the ground on which it had been at first exercised. The next step would probably be, to grant the commission on the application of one party who showed an *equitable* ground for obtaining it, such as, that a tenant or copyholder had destroyed, or not preserved, the boundaries between his own property and that of his lessor or lord. And to its exercise on such an equitable ground, no objection has ever been made" (*i*).

Doubtful, however, as the origin of the jurisdiction may be, it is certain that it has been viewed with extreme jealousy by modern equity Judges, who have always been desirous that the rights of parties should, when practicable, be tried and determined in the ordinary legal mode. And although formerly a wider jurisdiction may have been exercised, the rule now acted upon is that laid down by the Lord Keeper in the principal case, "*that the Court has no*

(*f*) *Mullineux* v. *M.*, *Peckering* v. *Kimpton*, Toth. (ed. 1649) 39 (it is p. 101 in ed. 1671); *Spyer* v. *S.*, Nels. 14; *Boteler* v. *Spelman*, Rep. t. Finch, 96; *Wintle* v. *Carpenter*, *ibid.* 462; *Glynn* v. *Scawen*, *ibid.* 239.

(*g*) Reg. Brev. 157 b.

(*h*) *Ibid.*

(*i*) *Speer* v. *Crawter*, 2 Mer., p. 416; and see Story, Eq. Jur. (1892), p. 402.

jurisdiction to fix the boundaries of legal estates, unless some equity is superinduced by the act of the parties" (*k*).

In the principal case the Lord Keeper refused to issue a commission to ascertain the boundaries of two adjacent manors, inasmuch as the soil itself was not in question, and his decision was followed by Grant, M.R., in *Speer* v. *Crawter*, *supra*. So likewise the Court has refused to entertain a bill filed by the rector of a parish for an account of tithes, and to have a commission to settle the boundaries of the parish and the glebe (*l*); and also a bill filed by a parish to avoid confusion in making their rates, and praying a commission to fix their boundaries for that purpose (*m*).

Where, moreover, a party has allowed boundaries to fall into confusion, he cannot ask for a commission against another who was not shown to have obtained possession improperly. In *Miller* v. *Warmington* (*n*), a termor having, by himself or his under-tenants, suffered the boundaries between the demised premises and contiguous lands of his own to become confused, he was held not entitled after the expiration of the term to a commission to ascertain them in opposition to the assignee of the lessor, who then, and had since, continued in the possession of both, it not being shown that such possession was improperly obtained.

The jurisdiction vested in the High Court of Chancery has been transferred to the High Court of Justice, and all the Judges of the High Court have now the same jurisdiction (*o*). The jurisdiction therefore still exists, and the practice will probably be moulded to meet the requirements of modern times, and the alterations in modern procedure (*p*).

2. Cases in which a Commission has been issued, or an issue directed.

If the confusion of boundaries has been occasioned, not by the negligence of both, but by the *fraud* of one of the parties, where, for instance, he has been gradually encroaching, by ploughing or

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(*k*) See *Speer* v. *Crawter*, 2 Mer., p. 418; *O'Hara* v. *Strange*, 11 Ir. Eq. R. 262; *Ireland* v. *Wilson*, 1 Ir. Ch. R. 623.

(*l*) *Atkins* v. *Hatton*, 2 Anst. 386.

(*m*) *St. Luke's* v. *St. Leonard's*, 2 Anst. 395; cited *Waring* v. *Hotham*, 2 Dick. 550, nom.

(*n*) 1 J. & W. 484.

(*o*) See the Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18 and 36.

(*p*) Cf. *Lascelles* v. *Butt*, 2 Ch. D. 593; Arbitration Act, 1889, ss. 13 and 14; *Spike* v. *Harding*, 7 Ch. D. 871; *Searle* v. *Cook*, 43 Ch. D. 519.

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digging too near to the other, with the intention of obliterating the boundaries, a Court of equity has interfered (*q*).

Where such a relation exists between two parties, as that of tenant and landlord, which makes it the duty of the tenant to preserve the boundaries, if he permits them to be destroyed, so that the landlord's land cannot be distinguished from his, and restored specifically, he will, even in the absence of fraud on his part, be compelled to substitute land of equal value, the land or its value being ascertained by commission. "It has long been settled," observes Lord Eldon, "and that law is not now to be unhinged, that a tenant contracts, among other obligations resulting from that relation, to keep distinct from his own property during his tenancy, and to leave clearly distinct at the end of it, his landlord's property, not in any way confounded with his own. This is, therefore, a common equity, that a tenant, having put his landlord's property and his own together, for his own convenience, in order to make the most of it during his tenancy, is bound, at the end of the term, to render up specifically the landlord's land, and if he cannot, that a commission shall issue from a Court of equity to inquire what were the lands of the landlord, the Court taking care, to the intent that the tenant may discharge his obligation, to do what is right as to the possession in the meantime; and if the tenant has so confounded the boundaries, sub-dividing the land by hedges and stones, and destroying the metes and bounds, so that the landlord's land cannot be ascertained, the Court will inquire what was the value of the landlord's estate, valued fairly, but to the utmost, as against that tenant, who has himself destroyed the possibility of the landlord's having his own" (*r*).

The Court, moreover, has jurisdiction to ascertain the boundary *during the term* if the tenant has confused the lands demised with lands of his own, for it is clearly his duty, not merely to leave the boundary between his own land and his landlord's distinct at the expiration of the term, but also to keep it distinct during the term (*s*).

(*q*) *Wintle* v. *Carpenter*, Rep. t. Finch, 462; *Bute* v. *Glamorganshire, etc., Co.*, 1 Ph. 681; *Rous* v. *Barker*, 4 Bro. P. C. 660, Toml. edit.; *Atkins* v. *Hatton*, 2 Anst. 386; and see Seton (7th ed.), pp. 1823, 4.

(*r*) *Att.-Gen.* v. *Fullerton*, 2 V. & B. 264; and see *Glynn* v. *Scawen*, Rep. t Finch, 239; *Wintle* v. *Carpenter*, *ib.* 462; *Aston* v. *Exeter*, 6 V. 293; *Leeds* v. *Stafford*, 4 V. 180; *Grierson* v. *Eyre*, 9 V. 345; *Willis* v. *Parkinson*, 2 Mer. 507; *Godfrey* v. *Littel*, 1 Russ. & M. 59; 2 Russ & M. 630; *Brown* v. *Wales*, 15 Eq. 142.

(*s*) *Spike* v. *Harding*, 7 Ch. D. 871; Woodfall (21st ed.), 778.

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And it seems that the same result would follow, if the confusion of the boundaries was occasioned by a tenant for life (*t*); or where confusion of the boundaries of manors was occasioned by the acts or neglect of a tenant or lessee of one of the manors being the owner of the other (*u*).

And it seems where a confusion of lands was occasioned by a devisor, if they came into the hands of parties whose duty it was to ascertain the boundaries, a person entitled to part of such lands might come into equity to establish his claim. Thus in *Hicks* v. *Hastings* (*x*), a testatrix by her will appointed the manor of Watton (over which she had an equitable power of appointment) to uses, under which the plaintiff became entitled as tenant in tail in possession, and devised her residuary real estate to trustees upon trust to sell. The trustees sold (amongst other things) a field, part of which was shown by the abstract to be parcel of the manor, and procured the legal estate in the whole to be conveyed to the purchaser. It was held by Page Wood, V.-C., that, notwithstanding the fault of the confusion lay with the party through whom the plaintiff claimed, the plaintiff was not precluded from establishing in the Court a claim to a portion of the land and to a proportional part of the rents from the time when he became of age. And an inquiry was directed, in what part of the field the plaintiff's portion was situated (*y*).

So relief would be granted not only against a party guilty of neglect or fraud in causing a confusion of boundaries, but also against all those who claimed under him, either as volunteers or purchasers, with notice (*z*).

The Court, in cases relating to confusion of boundaries, proceeds upon the same principle as it does where an agent or bailiff, or any other person in a fiduciary position, mixes the trust property with his own, that is, the *cestui que trust* will be held entitled to every portion of the blended property which the trustee cannot prove to be his own (*a*).

(*t*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 133.

(*u*) See *Speer* v. *Crawter*, 2 Mer. 415, 418; *Clayton* v. *Cookes*, 2 Atk. 449.

(*x*) 3 Kay & J. 701.

(*y*) And see *Clarke* v. *Yonge*, 5 B. 523.

(*z*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 134; *Hicks* v. *Hastings*, 3 K. & J. 701; *Brown* v. *Wales*, 15 Eq. 142.

(*a*) *Lupton* v. *White*, 15 V. 432; *Panton* v. *P.*, cited 15 V. 440; *Chedworth* v. *Edwards*, 8 V. 46; *Cook* v. *Addison*, 7 Eq. 466; *Re Oatway*, [1903] 2 Ch. 356; Lewin (12th ed.), p. 332.

Wake v. Conyers.

The plaintiff must show (1) some grounds of equitable relief: see *supra*, p. 170; (2) that some portion of the lands, the boundaries of which are alleged to have been confused, is in the possession of the defendant (*b*); (3) a clear title to some land in the possession of the defendant (*c*); (4) that without the aid of the Court the boundaries cannot be found (*d*).

In cases, however, where boundaries have become confused or lost by the acts of the parties, the action will generally take the form of a claim for a declaration of right and an injunction against trespass (*e*).

Although hearsay evidence is admissible on the question of parochial or manorial boundaries, it is not so as to the boundaries between two private proprietors (*f*). Nor is a tithe-map admissible in evidence as showing boundaries in case of a disputed title (*g*).

Where the quantity of land in the possession of the plaintiff is doubtful, the Court will direct an inquiry (*h*), or a commission or issue (*i*).

Another and a very old ground for equity interposing in cases of this kind, which is mentioned in the principal case, was to prevent multiplicity of suits (*k*). In the case of *The Marquis of Bute* v. *The Glamorganshire Canal Company* (*l*), a commission to ascertain boundaries was prayed for, and the bill, amongst other things, alleged that the defendants had gradually encroached upon the plaintiff's land, filling up the ditch or the greater part of it, and obliterating the boundary, and that the occupiers were fifty in number, and that it would be impracticable to proceed at law.

The Courts have jurisdiction to issue a commission to ascertain boundaries in our colonies (*m*).

(*b*) *Att.-Gen.* v. *Stephens*, 6 De G. M. & G. 121.

(*c*) *Ibid.*

(*d*) *Miller* v. *Warmington*, 1 J. & W. 491.

(*e*) Cf. *Marshall* v. *Taylor*, [1895] 1 Ch. 641.

(*f*) *Nicholls* v. *Parker*, 14 East, 331 (n.); *Clothier* v. *Chapman*, *ib.*; cf. Wills on Evidence (2nd ed.), p. 222 *et seq.*

(*g*) *Wilberforce* v. *Hearfield*, 5 Ch. D. 709; Wills on Evidence (2nd ed.), p. 229. As to entries in parish books and receipts for rent, see *Att.-Gen.* v. *Stephens*, 1 K. & J. 724.

(*h*) *Hicks* v. *Hastings*, 3 K. & J. 701.

(*i*) *Godfrey* v. *Littel*, 2 Russ. & M. 630.

(*k*) See *Bouverie* v. *Prentice*, 1 Bro. Ch. 200; *Mayor, etc.* v. *Pilkington*, 1 Atk. 282, 284; and see *Whaley* v. *Dawson*, 2 Sch. & L. 370, 371; *The Commissioners, etc.* v. *Glasse*, L. R. 7 Ch. 456.

(*l*) 1 Ph. 681.

(*m*) *Tulloch* v. *Hartley*, 1 Y. & C. C. C. 114; *Paget* v. *Ede*, 18 Eq. 118; *Penn* v. *Baltimore*, *post*.

References.—A reference to Chambers may now be directed in lieu of the issue of a commission, further consideration being adjourned and costs reserved (*n*); or, *semble*, a reference under sections 13 or 14 of the Arbitration Act, 1889; or an issue (*o*).

Forms of Commissions.—In the Forms of Commissions for ascertaining Boundaries it will be seen (*p*) that all proper consequential directions for compensation, apportionment, and accounts of rents and timber cut will be made.

Corporations.—As to authorising the identifying of land and other possessions of ecclesiastical and collegiate corporations, see 2 & 3 Will. 4, c. 80.

Costs.—The costs of a commission for settling boundaries and separating freeholds and copyholds were ordered to be borne by the parties equally, though the interests were not equal, in *Norris* v. *Le Neve* (*q*).

Right to Distrain lost by Confusion of Boundaries, etc.—A somewhat similar class of cases may be here mentioned, in which the owner of a rent will be entitled to relief in equity, "on the usage of payment," where, in consequence of the confusion of boundaries or otherwise, the particular lands on which the rent is a charge cannot be fixed on, as a fund for the legal remedy by distress (*r*).

But the Court will not grant relief unless the plaintiff can fix upon some house or parcel of land and say that it was part of the land sought to be charged; nor would it interfere in the case of heriots payable by custom out of the chattels of a deceased tenant by his executor, or against his heir, in the absence of his personal representatives (*s*).

(*n*) *Spike* v. *Harding*, 7 Ch. D. 871; Seton (7th ed.), p. 1823.

(*o*) *Godfrey* v. *Littel*, 1 Russ. & M. 59, 2 *ib.* 630; R. S. C., 1883, Order 33, rr. 1, 2; Order 36, r. 5.

(*p*) See Seton (7th ed.), p. 1822; *Att.-Gen.* v. *Bowyer*, 5 V. 300; *Att.-Gen.* v. *Fullerton*, 2 V. & B. 263; *Reresby* v. *Farrer*, 2 Vern. 414; *Norris* v. *Le Neve*, 3 Atk. 32; *Att.-Gen.* v. *Wax Chandlers Co.*, L. R. 6 H. L. 14; *Att.-Gen.* v. *Chambers*, 4 De G. & J. 58.

(*q*) 3 Atk. 32.

(*r*) See *Leeds* v. *Powell*, 1 Ves. Sen. 171, 172; *North* v. *Strafford*, 3 P. W. 148; *Bouverie* v. *Prentice*, 1 Bro. Ch. 200; *Leeds* v. *Corp. New Radnor*, 2 Bro. Ch. 518; *Mayor of Basingstoke* v. *Bolton*, 1 Drew. 289.

(*s*) *Mayor of Basingstoke* v. *Bolton*, *supra*.

Inclosure Acts.—Under the Inclosure Acts, 1845, 1876, the Minister of Agriculture (*t*) has power, when lands are inconveniently mixed, to confirm an agreement for division made by the parties interested, and to counterchange the titles of parcels allotted on the division, and, with the consent of the lord in the case of copyhold lands, to appoint an assistant commissioner to make a redivision of intermixed lands (*u*).

Former Copyholds.—In connection with the extinguishment of manorial incidents, the Law of Property Act, 1922, s. 139 (i) (vi), provides for the determination of the boundaries of land subject to manorial incidents by the Minister of Agriculture upon the application in writing of the lord or of the tenant.

Charities.—Where charity lands have been occupied with other lands and the tenant cannot ascertain what part of the lands belongs to the charity, the Court of Chancery has frequently issued commissions to ascertain what belongs to the charity and what does not. As to the power of the Board of Charity Commissioners to ascertain lands charged with a rent for the benefit of a charity, not exceeding £10, see 18 & 19 Vict. c. 124, s. 33.

(*t*) See the Board of Agriculture Act, 1889.
(*u*) See 8 & 9 Vict. c. 118; 9 & 10 Vict. c. 70; 39 & 40 Vict. c. 56.

COMPROMISES.

STAPILTON *v.* STAPILTON.

1739. 1 Atk. 2.

Compromise—Family Arrangement.

An agreement entered into upon a supposition of a right, or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and, therefore, the compromise of a doubtful right is a sufficient foundation of an agreement.

Where agreements are entered into to save the honour of a family, and are reasonable ones, a Court of equity will, if possible, decree a performance of them.

By a deed, dated on August 21, 1661, Philip Stapilton was tenant of the premises in question for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, Henry and Philip, they, by deeds of lease and release, September 9 and 10, 1724, reciting that, for settling and perpetuating all manors, etc., in the name and blood of the Stapiltons, and for making provision for his two sons, etc., for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereinafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s., released, and confirmed to Thomson and Fairfax all those manors, etc.: To have and to hold to them, their heirs and assigns, to the use (as to part) of Philip the father, his heirs and assigns for ever, and as to another part, to the use of Philip the father for life, remainder

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to Henry the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to Philip the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of Henry in tail, remainder to the daughters of Philip the son in tail, remainder to the right heirs of Philip the father. And as to the remaining part, to the use of Philip the father for life, with like limitations in the first place to Philip the son and his issue, and then to Henry and his issue, remainder in fee to the father.

There were covenants to suffer a recovery within twelve months and likewise for farther assurances. N.B. To this deed the heir of the surviving trustee in the deed in 1661 was not a party.

But, by deeds of lease and release, dated September 28 and 29, 1724, to which the heir of the surviving trustee of the deed of 1661 was a party, the father and two sons make Thomson and Fairfax tenants to the *præcipe*, in order to suffer a recovery for the purposes mentioned in the former deeds of September 9 and 10, 1724.

Before any recovery suffered, Henry died, leaving issue the plaintiff.

Afterwards, by lease and release, April 12 and 13, 1725, to which the heir of the surviving trustee of the deed of 1661 was a party, Philip the father and Philip the son covenant to suffer a recovery, in which Thomson and Fairfax were to be tenants to the *præcipe*, to the use, as to part, of Philip the father, his heirs and assigns; and as to the other part, to the use of Philip the father for life, remainder to Philip the son in fee.

In Trinity Term, 1725, a recovery was suffered, in which were the same tenant to the *præcipe*, the same demandant, and the same vouchees (except Henry, who was dead), as were covenanted to be by the first deed; it was likewise suffered within twelve months after the first deed.

The father Philip Stapilton, being dead, the plaintiff, as son and heir of Henry, brought this bill to establish his title to the premises in question, and for the whole estate as tenant in

tail under the old settlement, and to be let into possession, and for an account of rents received by Philip Stapilton the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant Philip the son, by his answer confesses the several deeds before mentioned, but says Henry was a bastard, and that, by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

Upon an issue directed, Henry was found illegitimate, and the cause was now heard upon the equity reserved, when the counsel for the plaintiff, waiving the claim to the whole estate, insisted upon these two points:—

Argument for the Plaintiff.—1st. That the recovery suffered in Trinity Term, 1725, should enure to the use of the deeds of September 9 and 10, 1724, and not to the uses of the deed in 1725.

2ndly. Supposing it did not, yet that the deed of 1724 was such an agreement as this Court will carry into execution.

As to the first point, it was said that the uses, when once declared, cannot be altered, unless all the parties entitled to the uses join in the new declaration: and Henry did not join in the deed of 1725. * * * *

As to the second point: this cannot be considered as a voluntary agreement, for Henry's legitimacy was then doubtful, and, if he had proved legitimate, Philip would have come into this Court to have the agreement executed, and Henry would have been bound by it. This Court has decreed the performance of agreements like this founded upon mistakes; as in the cases of *Frank* v. *F.* (*a*) and *Cann* v. *C.* (*b*).

Argument for the Defendant.—For the defendant it was argued, as to the first point, that Henry being dead before the recovery was suffered, the intent of the parties in the first deed could not be pursued; for the plaintiff (supposing him legitimate)

(*a*) 1 Ch. Ca. 84. (*b*) 1 P. W. 723.

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claims paramount his father, and the deed of 1661; therefore, as the recovery could not substantiate the first deed, supposing him legitimate, it shall not substantiate it now he is found illegitimate * * * *

As to the second point: take it as an agreement, this Court will not decree a performance of it; for, supposing Henry had been found legitimate, this Court would not have decreed a performance of it against the plaintiff; so that, in regard to the defendant, it must be considered as a voluntary agreement, into which he was drawn without any valuable consideration; and the covenant for further assurance will be void, as the deed itself to which it is annexed is void: and so it was determined in the case of *Furzaker* v. *Robinson* (*c*).

Lord Chancellor Hardwicke.—The plaintiff in this case is entitled to have a decree. There was a sufficient foundation for Philip the father, and Henry and Philip, his two sons, to execute the lease and release of September 9 and 10, 1724. It was *to save the honour of the father and his family, and was a reasonable agreement; and, therefore, if it is possible for a Court of equity to decree a performance of it, it ought to be done.*

It would be very hard for the defendant, on his side, to endeavour to set aside this agreement, and the effect of this deed. Consider the state and situation of the family at the time of making the agreement; Philip had these children grown up, had a very considerable real estate, both his sons then owned as legitimate, their father and mother had lived together as husband and wife for many years, and at the time of this agreement were so; there was a foresight in the father and mother that such a dispute between their two sons might hereafter arise, to their dishonour, and likewise that of the family.

The foundation of this agreement, the illegitimacy of the eldest son Henry, has now been determined by a trial, and it is found that Henry was a bastard; yet both the sons are of the same blood of the father equally, though not so in the notion of the law.

(*c*) Pr. Ch. 475.

If the elder son should be found illegitimate (as he now is), the father knew he would be left without any provision, if no such agreement was made; and, on the other hand, if his legitimacy should be established, then Philip, the younger son, would have nothing. To prevent these disputes and ill consequences, the father brings both his sons into an agreement to make a division of his real estate. It is very plain the parties did not know who was the heir of the surviving trustee in the settlement of 1661, at the time of the lease and release of September 9 and 10, 1724; because they covenant a writ of entry should be sued out within twelve months, which is a very unusual time to limit to suffer a recovery, and done in order to give time to find out the heir of the surviving trustee, if they could find him out; but he was afterwards found, and made a party to the deeds of September 28 and 29, 1724.

The bill is brought by the eldest son and heir of Henry, to have the benefit and possession of the whole estate, and to have an account of the rents and profits, and to be quieted in the possession, and for general relief. Upon the first hearing an issue was directed to try whether Henry the father was legitimate, and it was found he was not: and now the plaintiff insists upon having the benefit of this agreement, whereby he is only entitled to a part; this being the bill of an infant, he may have a decree upon any matter arising upon the state of his case, though he has not particularly mentioned and insisted upon it, and prayed it by his bill; but it might be otherwise in the case of an adult person.

Upon this case there arise two general questions:—

First, Whether the plaintiff has any estate at law by virtue of any of the conveyances, or by the recovery?

Secondly, If he has no estate at law, or only a defeasible one, whether he is entitled to have the benefit of this agreement, and to have it carried into execution here?

The first question consists of two branches:—

First, Whether the lease and release of September 9 and 10, 1724, will amount to a good declaration of the uses of the recovery, notwithstanding the subsequent deed of April, 1725?

Secondly, If not, whether the recovery of Trinity Term,

1725, having barred the estate tail, will make good any estate which passed by the lease and release of September 9 and 10, 1724? (Both of these questions were decided by the Chancellor in the affirmative, upon grounds depending upon the law of Recoveries and the Statute of Uses. So much of the judgment as relates thereto is now omitted.)

* * * * It has been objected that, if the plaintiff has any title, his remedy is at law; but I think it is more properly here. He is an infant, and has come recently into this Court. Nor do I think this case depends entirely upon the point of law; for I am of opinion that the plaintiff is entitled to have an execution of the agreement as a good and binding agreement in this Court.

The question is, whether there was *any valuable consideration* on all sides for entering into this agreement? If so, then there is a sufficient ground for coming here; but a mere volunteer is not entitled to come here for an execution of an agreement. But here is a proper consideration, as appears in the recital of the deed of 1724. Neither is it the common case of a bastard; for the law of England does allow of some privileges to a bastard eigne, and their parents are not punishable by the canon law for antenuptial fornication.

In the case of *Cann* v. *C.* (*d*), it was laid down by Lord Macclesfield that an agreement, entered into upon a supposition of a right (*e*), or of a doubtful right, though it after comes out that the right was on the other side, shall be binding, and the right shall not prevail against the agreement of the parties; for the right must always be on one side or the other; and therefore the compromise of a doubtful right is a sufficient foundation of an agreement.

Another objection has been made to this agreement, that the benefit on Henry and Philip's side was not mutual and equal. During both their lives the benefit and obligation was mutual, and Henry would have been equally compellable to suffer a

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(*d*) 1 P. W. 723, 727.

(*e*) Lord Eldon in *Stockley* v. *S.*, 1 V. & B. 31; 12 R. R., at p. 189, observes that the words of Lord Macclesfield, instead of "a supposition of right," might have been "a doubtful right."

recovery with Philip. But it is said that an alteration as to their mutual benefit has happened by the death of Henry; and it is said that if Henry had been legitimate, the plaintiff would not have been compellable to suffer a recovery, because the issue in tail is not compellable to perform the covenants of his ancestor, the tenant in tail. But here the chance was at first equal; and it is hard to say that the act of God should hinder the agreement from being carried into execution; the chance was equal, who died first, Henry or Philip? If Henry had been legitimate, and Philip had died in Henry's life, leaving children, I am of opinion Philip's son would have been entitled to have come against Henry for an execution of the agreement; and, therefore, the chance was at first equal on both sides, and we are not to consider how the event has happened.

Another objection has been taken, that the father made use of his coercive power over Philip to force him into this agreement; and it is said equity does not favour agreements made by compulsion. But *this Court always considers the reasonableness of the agreement*; besides, here is no proof of compulsion by the father: if there was any compulsion, it seems rather to have been made use of against Henry, who was then esteemed his eldest son; and, considering the consequence of setting aside this agreement, *a Court of equity will be glad to lay hold of any just ground to carry it into execution, and to establish the peace of a family.*

His Lordship, therefore, declared that the plaintiff is entitled to the lands and premises limited in remainder, to the first son of Henry Stapilton, his father, by the deeds of September 9 and 10, 1724, according to the uses therein, and to the benefit of the covenants in those deeds, and decreed the defendant Philip to come to an account for the rents of the said premises; and declared that Philip was entitled to hold the lands, limited by the deeds of September 9 and 10, 1724, to Philip the elder for life, with remainder to the defendant for life, against the plaintiff and his heirs; and that the defendant should make further assurance to the plaintiff of his part, and the plaintiff the like assurance to the defendant of his part, and no costs on either side.

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NOTES.

1. Compromises Generally.
2. Family Arrangements, p. 198.

1. Compromises Generally.

The compromise of doubtful claims, whatever may be the actual rights of the parties, has, from the policy of preventing litigation, been generally upheld in all enlightened systems of jurisprudence. So, in the law of Scotland, compromises, under the name of *transactions*, are equally favoured (*f*).

In our law, it is clear that if a person, after due deliberation, enter into an agreement for the purpose of compromising a claim made *bona fide*, to which he believed himself to be liable, and with the nature and extent of which he is fully acquainted, the compromise of such a claim is a sufficient consideration for the agreement, and a Court of equity, without inquiring whether he was in truth liable to the claim, will compel a specific performance (*g*). The Court will enforce specifically private compromises of rights, in the same way in which it will enforce other contracts (*h*). This supposes the existence of a concluded agreement, made between persons capable of contracting, for adequate consideration (*i*), with full knowledge (*k*), and without pressure (*l*).

The real consideration and motive of a compromise, as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim (*m*).

"In dealing with a compromise, always supposing it to be a thing that is within the power of each party, if honestly done, all that a Court of justice has to do is to ascertain that the claim or the representation on the one side is *bona fide* and truly made, and that on the other side the answer or defence or counterclaim is also *bona*

(*f*) Stair's Inst. tit. 7, s. 9; *Hotchkin* v. *Dickson*, 2 Bli. 348; *Stewart* v. *S.*, 6 Cl. & Fin. 911; and see *Trigge* v. *Lavallée* (1864), 15 Moo. P. C. 271; 11 W. R. 404, as to the old French law then in force in Lower Canada.

(*g*) *Attwood* v. ——, 1 Russ. 353; *Pickering* v. *P.*, 2 B. 56; *Partridge* v. *Smith*, 11 W. R. 714; *Miles* v. *New Zealand, etc., Co.*, 32 Ch. D. 266; *Re Pope*, [1908] 2 K. B. 169.

(*h*) Fry, Sp. Performance (6th ed.), pp. 24, 719.

(*i*) Cf. *Naylor* v. *Winch*, 1 S. & S. 565; *Lucy's Case*, 4 De G. M. & G. 356; *Cook* v. *Wright*, 1 B. & S. 559, 570; *Miles* v. *New Zealand, etc., Co.*, 32 Ch. D. 266.

(*k*) *Pusey* v. *Desbouverie*, 3 P. W. 315; *Smith* v. *Pincombe*, 3 Mac. & G. 653.

(*l*) See *Huguenin* v. *Baseley*, and note, *infra*; *Re Margetson and Jones*, [1897] 2 Ch. 314; *Williams* v. *W.*, L. R. 2 Ch. 294.

(*m*) Pollock, Contracts (9th ed.), p. 207, citing *Trigge* v. *Lavallée*, 15 Moo. P. C. 271, 292; *Wilby* v. *Elgee*, L. R. 10 C. P. 497.

fide and truly made. I mean by *bona fides* the truth of the parties, and above all this, that the compromise is not a sham, or an instrument to accomplish or to carry into effect any ulterior or collateral purpose, but that the thing sought to be done is within the very terms of the compromise—that all that the parties contemplate and desire to effect and to deal with is whether the claim on the one side or the defence on the other side shall be admitted or not; or whether if both things are *bona fide* brought forward there may not be some concession on the one side and some concession on the other side, so as to arrive at terms of agreement, which, if honestly made, is an honest settlement of an existing dispute. That is the characteristic of a compromise, and if it be not manifestly *ultra vires* of the parties, it is one that a Court of justice ought to respect and ought not to permit to be questioned " (*n*).

A *bona fide* compromise of a real claim is good consideration, whether the claim would have been successful or not (*o*). " It seems to me that if an intending litigant *bona fide* forbears a right to litigate a question of law or fact which it is not vexatious or frivolous to litigate, he does give up something of value " (*p*). If a person believes as a fact that money is due to him, then his claim is honest, and the compromise of that claim will be binding and will form a good consideration, although, if prosecuted, it might be defeated (*q*).

A distinction has been taken between an error of law and an error of fact. " It is a maxim of equity that parties making a mistake in matters of fact shall not be held bound by acts committed by them under such mistake (*r*). When, however, they make a mistake in law, they cannot afterwards be heard to say that the contract shall on that account be set aside " (*s*).

(*n*) *Per* Lord Westbury in *Dixon* v. *Evans*, L. R. 5 H. L., at p. 619; see *Holsworthy U. C.* v. *Holsworthy R. C.*, [1907] 2 Ch. 62.

(*o*) *Miles* v. *New Zealand, etc. Co.*, 32 Ch. D. 266, where *Callisher* v. *Bischoffsheim*, L. R. 5 Q. B. 449, which was doubted by Brett, L.J., in *Ex p. Banner*, 17 Ch. D., at p. 489, was approved by the C. A.; Leake (7th ed.), p. 458.

(*p*) *Per* Bowen, L.J., 32 Ch. D., at p. 291.

(*q*) *Cook* v. *Wright*, 1 B. & S. 559.

(*r*) See *The Monarch*, 12 P. D., at p. 7; *Huddersfield Banking Co.* v. *Lister*, [1895] 2 Ch., at p. 284.

(*s*) *Marshall* v. *Collett*, 1 Y. & C. Ex. C., at p. 238; and see *Broughton* v. *Hutt*, 3 De G. & J. 501; *Cooper* v. *Phibbs*, L. R. 2 H. L., at p. 170; *The Midland, etc., Ry. Co. of Ireland* v. *Kinder*, 6 W. R. 511; *Beauchamp* v. *Winn*, L. R. 6 H. L. 223; *Daniell* v. *Sinclair*, 6 A. C. 181, 190; *The Directors, etc., of the Midland, etc., Ry. Co. of Ireland* v. *Johnson*, 6 H. L. Cas. 798, 811.

But in equity the line between mistakes in law and mistakes in fact has not been (at any rate of recent years) so clearly and sharply drawn (*t*). Private rights—*e.g.*, the rights depending on the true construction of a particular instrument—are matters of fact, and if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable *to be set aside*, as having proceeded upon a common mistake (*u*). But the sole error of the defendant would not be a ground for resisting specific performance (*x*).

It has been laid down that if a party, acting in ignorance of a plain and settled principle of law, is induced to give up a portion of his property to another under the name of a compromise, equity will relieve him from the effect of his mistake (*y*). But this statement is not very intelligible or easy of application (*z*). Questions on the construction of wills may depend upon principles which in the opinion of some competent persons are quite plain, but it seems clear that a *bona fide* compromise in respect of such instruments will be upheld, although in the result the opinion upon which the compromise was based turns out to be wrong (*a*).

It will be generally found that the cases in which relief has been given in consideration of a mere mistake of law have turned upon an admixture of other ingredients, such as misrepresentation, imposition, undue influence, imbecility, or surprise. And it may

(*t*) *Daniell* v. *Sinclair*, *supra*; *Eaglesfield* v. *Marquis of Londonderry*, 4 Ch. D., at p. 702, *per* Jessel, M.R.

(*u*) See judgment of Lord Westbury in *Cooper* v. *Phibbs*, L. R. 2 H. L. 170; *Stone* v. *Godfrey*, 5 De G. M. & G. 76; *M'Carthy* v. *Decaix*, 2 Russ. & M. 614, disapproved on another point in *Harvey* v. *Farnie*, 8 A. C., at p. 52; *Livesey* v. *L.*, 3 Russ. 287; *Galloway* v. *G.*, 30 T. L. R. 531; and cf. *Stewart* v. *S.*, 6 Cl. & Fin. 966 and 970; *Manifold* v. *Johnston*, [1902] 1 Ir. R. 7; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Re Roberts*, [1905] 1 Ch. 704; *Pollock* (9th ed.), p. 479.

(*x*) See Fry, Sp. Per. (6th ed.), pp. 360, 361, citing *Tamplin* v. *James*, 15 Ch. D., at p. 217; *Powell* v. *Smith*, 14 Eq. 85; *Hart* v. *H.*, 18 Ch. D. 671; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Van Praagh* v. *Everidge*, [1902] 2 Ch. 266; [1903] 1 Ch. 434.

(*y*) *Naylor* v. *Winch*, 1 Si. & St. 555; *Leonard* v. *L.*, 2 Ball & B. 180; *Dunnage* v. *White*, 1 Swans. 137; *Ramsden* v. *Hylton*, 2 Ves. Sen. 304; *Turner* v. *T.*, 2 Rep. Ch. 81; *Bingham* v. *B.*, 1 Ves. Sen. 126; explained in *Stewart* v. *S.*, 6 Cl. & Fin. 968; followed in *Cooper* v. *Phibbs*, L. R. 2 H. L. 150; *Lansdowne* v. *L.*, Mos. 364; 2 J. & W. 205; doubted in *Stewart* v. *S.*, 6 Cl. & Fin. 966. In the following cases relief was refused and the compromise enforced: *Worrall* v. *Jacobs*, 3 Mer. 195; *Pullen* v. *Ready*, 2 Atk. 587 and *infra*; *Stockley* v. *S.*, 1 V. & B. 30; *Persse* v. *P.*, 7 Cl. & Fin. 318; *Cann* v. *C.*, 1 P. W. 727; *Heap* v. *Tonge*, 9 Ha. 90; *Mildmay* v. *Hungerford*, 2 Vern. 243.

(*z*) See Story, Eq. Jur. (3rd ed.), § 127.

(*a*) See *Pullen* v. *Ready*, 2 Atk. 587, *infra*, p. 189; *Naylor* v. *Winch*, *supra*; *Pickering* v. *P.*, 2 B. 31, 56.

be stated generally that ignorance of the law, with a full knowledge of the facts and unattended by any of such circumstances, will furnish no ground for the interposition of a Court of equity (*b*). But where the result of denying relief will be to give to the other parties an unconscionable advantage, and the mistake is admitted or proved, equity will give relief, provided the parties can be placed in the same position as if the mistake had not occurred (*c*). But the Court must be satisfied that the conduct of the parties has been determined by mistake (*d*). Where the contract between the parties is to settle a *doubtful* right or question, whether it be of law or fact, by a give-and-take arrangement between themselves, such agreement will be upheld (*e*); but where there is a common mistake of fact or of the law as to private rights which goes to the very root of the matter, so as to prevent any real agreement from being formed, relief will be given (*f*).

The following cases relating to mistake were also of the nature of family arrangements, which are said to be especially favoured in equity (*g*). Yet it is not clear that in the several cases which have come before the Courts the decisions would have been different if the parties had not been members of the same family (*h*). But in some old cases it has been stated that the Court, in the case of family arrangements, administers an equity which is not applied to agreements generally (*i*).

The question whether a person is heir of a certain person or not, often depends upon a doubtful fact, *e.g.*, whether a marriage has or has not been celebrated; nevertheless, it is clear, that if, as in the principal case, that fact be doubtful, two claimants, although one of them is afterwards clearly proved to be heir, may settle all disputes, especially to save the honour of the family, by dividing the property (*k*).

(*b*) See Story, Eq. Jur. (3rd ed.), § 138, and passim, citing *Stewart* v. *S.*, 6 Cl. & Fin. 694 to 971; *Kelly* v. *Solari*, 9 M. & W. 54, 57, 58; *G. W. Ry. Co.* v. *Cripps*, 5 Ha. 91. (*c*) *Ward & Co.* v. *Wallis*, [1900] 1 Q. B. 675.

(*d*) *Stone* v. *Godfrey*, 5 De G. M. & G. 76, 90.

(*e*) *Leonard* v. *L.*, 2 Ball & B., at p. 182; see *per* Bowen, L.J., in *Miles* v. *New Zealand Alford Co.*, 32 Ch. D 291; cf. *Fullerton* v. *Provincial Bank, etc.*, [1903] A. C., at p. 313.

(*f*) See Pollock, Contracts (9th ed.), pp. 499, 500; Vaizey, Settlements (1887), ch. 19, s. 2, p. 1500; Fry, Sp. Per. (6th ed.), pp. 355, 358; and see *Wilding* v. *Sanderson*, [1897] 2 Ch. 534; *Jennings* v. *J.*, [1898] 1 Ch. 378.

(*g*) See the principal case and *Stockley* v. *S.*, 1 V. & B. 23.

(*h*) See Vaizey, Settlements (1887), p. 1501.

(*i*) *Stockley* v. *S.*, 1 V. & B. 29; *Bellamy* v. *Sabine*, 2 Ph. 425.

(*k*) But see *Lansdowne* v. *L.*, Mos. 364, commented upon in *Stewart* v. *S.*, 6 Cl. & Fin. 966.

Stapilton v. Stapilton.

In *Neale* v. *N.* (*l*), James Neale and Joseph Neale, having an apparent title to copyhold lands as tenants in common in fee under the will of their father, entered into a parol agreement to make partition of the devised lands, and divided them accordingly, James, the elder brother, taking somewhat the larger share, a doubt being then entertained whether their father had a right to devise the lands. James was, in fact, at the time of this agreement tenant in tail under the limitations of a surrender made by his grandfather; and, after James's death without issue, Joseph, having discovered his own title as tenant in tail, repudiated the agreement, and brought an action to recover the whole estate. On a bill being filed by the devisee of James, it was argued for Joseph that he had never agreed to abandon any right which he might thereafter acquire, and which was neither in his own contemplation nor in that of the party with whom the agreement was made; and that, in most of the cases which were cited, the parties had a full knowledge of all the circumstances enabling them to enter into a compromise. However, Langdale, M.R., decreed Joseph to do all necessary acts to bar the entail, and vest the parts of the lands allotted under the agreement to James, upon the trusts of James's will, being of opinion that the agreement, though *parol*, was yet in the nature of a family arrangement, and being followed by the uninterrupted several enjoyment (*m*) of the portions allotted to the two brothers respectively, was an agreement which the Court would enforce (*n*).

In *Pullen* v. *Ready* (*o*) there was a mistake of law common to all parties as to private rights. Legacies were given, to be forfeited upon marriage without consent; one of the legatees did marry without consent, and a family arrangement, without the advice of counsel, took place, and articles were executed, giving that legatee the benefit of the legacy. It was insisted afterwards that the arrangement was made under a mistake of law that the condition was only *in terrorem*, which, under the circumstances, it was not; but Lord Hardwicke decreed specific performance of the articles, saying that at the time of the execution of the article the marriage without consent could not but be known, and that the parties to it

(*l*) 1 Keen, 672.

(*m*) See *Williams* v. *W.*, L. R. 2 Ch. 294.

(*n*) See also *Frank* v. *F.*, 1 Ch. Ca. 84; approved by Cottenham, C., in *Stewart* v. *S.*, 6 Cl. & Fin. 966, and see *Hoghton* v. *H.*, 15 B., at p. 301; *Stockley* v. *S.*, 1 V. & B. 23; 12 R. R., at p. 189; *Heap* v. *Tonge*, 9 Ha. 90; *Manby* v. *Bewicke*, 3 Kay & J. 342; *Fowler* v. *F.*, 4 De G. & J. 250.

(*o*) 2 Atk. 587. See Fry, Sp. Per. (6th ed.), p. 374.

could not possibly be supposed to be ignorant of that *fact* which happened some years before. That it was said, they might know the *fact*, and yet not know the *consequence in law:* but if parties were entering into an agreement, and the very will out of which the forfeiture arose was lying before them and their counsel while the drafts were preparing, the parties should be supposed to be acquainted with the consequences of law as to that point, and should not be relieved under a pretence of being surprised, with such strong circumstances attending it (*p*).

In *Lawton* v. *Campion* (*q*) the children of John Lawton, a deceased remainderman, insisted as against their uncle Charles (a prior tenant for life in possession) that they were entitled, under the terms of a settlement, to have their portions raised from the death of their father in 1831. Some discussion took place, and a bill was filed by them. An arrangement was come to by deed, which, proceeding on the foundation of the validity of the claim, compromised the amount of the arrears of interest, and settled the amount of the future interest, which Charles thereby engaged to pay. It having been afterwards determined in another suit, that on the true construction of the settlement the claim of the children was unfounded, Charles instituted a suit to set aside the deed. "In my opinion," said Lord Romilly, "the thing compromised was not the right to have the portions immediately raised, but something collateral to it, and arising and flowing out of it. The liability of the plaintiff to pay was not, in fact, compromised; but the amount which he would have to pay, under a liability, assumed and admitted on both sides, was the thing compromised, and the only subject of the compromise. That is the view which I take of this case from the correspondence, and which the deed appears to me to confirm. It appears to me to have been entered into for the purpose of settling the question of the *amount* which the plaintiff was liable to pay to these ladies, and not to settle any question as to his liability to pay anything at all." And after referring to *Harvey* v. *Cooke* (*r*), as being exactly in point, his Honour added, "Undoubtedly a family arrangement was entered into in this case; but the question is, what it included. In my

(*p*) See *Cann* v. *C.*, 1 P. W. 723; *Mildmay* v. *Hungerford*, 2 Vern. 243; *Powell* v. *Smith*, 14 Eq. 85, but see judgment of Lord Westbury in *Cooper* v. *Phibbs* and other cases cited, *supra*, p. 187, note (*u*).

(*q*) 18 B. 87.

(*r*) 4 Russ. 57.

opinion, the liability of the plaintiff to pay anything, or in other words, the fact that the money was raisable on the death of John Lawton, was not an ingredient in that arrangement, and did not form a term of it. That question was not present to the mind of either party at the time when they entered into this arrangement, as one which could be contested; the arrangement was limited to matters in difference, flowing out of and proceeding from that which was considered to be an undoubted liability." A decree was accordingly made setting aside the deed (*s*).

Upon a principle somewhat similar it has been determined that a compromise under the Court will not exclude a point of construction not then under consideration (*t*). But of course questions involved in the compromise will not be permitted to be reopened (*u*).

Where payments were made under a mistaken construction of a doubtful clause in a settlement the Court refused to direct them to be refunded, after many years of acquiescence by all parties, and after the death of one of the authors of the settlement, especially as subsequent family arrangements had proceeded on the footing of that construction (*x*).

And where a deed of family arrangement has been acted upon for many years, and no fraud is imputed, the Court will not set aside or alter such deed upon the mere allegation by some of the parties to it, that its provisions did not carry out their intentions (*y*).

Where parties come to be relieved against the consequences of mistakes in law, it is the duty of the Court to be satisfied that the *conduct of the parties has been determined* by those mistakes, otherwise great injustice may be done. Parties may be erroneously advised as to the law, but they may be told on what circumstances the question of law depends, and in what mode it may be tried, and they may determine that (whether the advice they have received be well or ill founded) they will give up the question in favour of the party with whom it arises. Cases of this nature, therefore, require the most careful examination, and particularly when they arise between parent and child (*z*).

(*s*) See *Cloutte* v. *Storey*, [1911] 1 Ch. 18, 33.

(*t*) *Bennett* v. *Merriman*, 6 B. 360.

(*u*) *Re South American, etc., Co.*, [1895] 1 Ch., at p. 50.

(*x*) *Clifton* v. *Cockburn*, 3 My. & K. 76; and see *G. W. Ry. Co.* v. *Cripps*, 5 Ha. 91; *Rogers* v. *Ingham*, 3 Ch. D. 351.

(*y*) *Bentley* v. *Mackay*, 31 B. 143; cf. *Bruty* v. *Edmundson*, 113 L. T. 1197.

(*z*) *Per* Turner, V.-C., *Stone* v. *Godfrey*, 5 De G. M. & G. 90; *Re Roberts*, [1905] 1 Ch. 704.

Stapilton v. Stapilton.

Good Faith. Full Disclosure.—In forming an agreement of compromise by way of a family arrangement there must be a full disclosure of all material (*a*) circumstances in the knowledge of the parties thereto, and it is immaterial whether information withheld be asked for by other contracting parties or not; but no obligation to disclose material facts exists in the formation of other agreements of compromise (*b*). In *Gordon* v. *G.* (*c*), an agreement was entered into between two brothers, the younger of whom disputed the legitimacy of the elder, for the division of the family estates. At the time of the agreement the younger brother was apprised of a private ceremony of marriage which had passed between their parents, but did not communicate that fact to the elder. The legitimacy of the elder brother being established on the trial of an issue directed, Lord Eldon, after the lapse of nineteen years, rescinded the agreement.

"If," said his Lordship, "the youngest son, knowing that fact, of which the plaintiff was ignorant (and the Court held on the evidence that he did so know), dealt with him without disclosing it, whether the omission of disclosure originated in design, or in an honest opinion of the invalidity of the ceremony, and of a want of obligation on his part to make the communication, the agreement cannot be sanctioned by the Court" (*d*).

Where the defendants propounded a will for probate, which was opposed by the plaintiff, but ultimately a compromise was agreed to, under which the will was admitted to probate, the plaintiff having afterwards discovered that the will was a forgery, the compromise was set aside on the ground that one of the defendants had concealed his knowledge of the forgery, and probate was revoked by the Probate Division (*e*).

So, where a plaintiff entered into a compromise to accept from the defendant a smaller sum than was due, upon the representation made to him by the defendant's solicitor of the poverty of the defendant, and that his father, a man of property, would not assist

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(*a*) *Maynard* v. *Eaton*, L. R. 9 Ch. 414.

(*b*) *Turner* v. *Green*, [1895] 2 Ch. 205; and see *Carlish* v. *Salt*, [1906] 1 Ch at p. 340.

(*c*) 3 Swans. 400; *Re Roberts*, *supra*; *Watt* v. *Assets Co.*, [1905] A. C. 317.

(*d*) And see *Pusey* v. *Desbouverie*, 3 P. W. 315, 321; *Harvey* v. *Cooke*, 4 Russ. 58; *Groves* v. *Perkins*, 6 Si. 576; *Leonard* v. *L.*, 2 Ball & B. 171; *Smith* v. *Pincombe*, 3 Mac. & G. 653; *Cook* v. *Greves*, 30 B. 378; *Greenwood* v. *G.*, 2 De G. J. & S. 28; *Tennent* v. *Tennents*, L. R. 2 H. L. Sc. 6, 9, 10; *Fane* v. *F.*, 20 Eq. 698; *Re Roberts*, [1905] 1 Ch. 704.

(*e*) *Priestman* v. *Thomas*, 9 P. D. 70; cf. *Cole* v. *Langford*, [1898] 2 Q. B. 36.

him, whereas the father, to the knowledge of the solicitor making the representation, had lately died intestate, it was held the compromise could not be supported (*f*).

If parties are not on *equal terms*, and one of them stands in such relation to the other as renders it incumbent on him to give a fuller account of the matter or question in dispute than he has done, the Court, although no intentional fraud may be imputable to such person, will not support a compromise entered into between the parties (*g*).

A concealment, however, of truth, or a suggestion of what is false, will not affect the validity of a compromise, unless it be relevant to the matter to be compromised (*h*).

Contracts of this kind will not of course be supported if they are in any way unconscionable, as where the party surrendering his rights was a person liable to imposition and without professional advice, or where a person under the influence of threats, and under apprehension of arrest, and without adequate consideration or advice, has given a security as a compromise of doubtful rights, or where a deed in the nature of a family arrangement has been executed by a *cestui que trust*, under pressure from the trustees in violation of their duties (*i*).

Power of Legal Adviser to compromise.—Neither counsel (*k*) nor solicitors (*l*) can compromise a case against the express wishes of their clients, and an action for so doing will lie against the latter (*m*), but not against the former (*n*). Both counsel (*o*) and solicitors being in ordinary cases entrusted with the general management of a cause, have power to compromise it, unless expressly forbidden so to do (*p*), and a solicitor is not guilty of actual negligence,

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(*f*) *Gilbert* v. *Endean*, 9 Ch. D. 259, 266.

(*g*) *Pickering* v. *P.*, 2 B. 31, 56; *Pusey* v. *Desbouverie*, 3 P. W. 315, 320, 321; *Sturge* v. *S.*, 12 B. 229.

(*h*) *Maynard* v. *Eaton*, L. R. 9 Ch. 414; *Watt* v. *Assets Co.*, [1905] A. C. 317.

(*i*) See *Huguenin* v. *Baseley* and *Chesterfield* v. *Janssen*, *post*, and notes.

(*k*) *Swinfen* v. *S.*, 27 L. J. Ch. 35, 491; *Neale* v. *Gordon-Lennox*, [1902] A. C. 465.

(*l*) *Fray* v. *Vowles*, 1 Ell. & Ell. 839; *Re Newen*, [1903] 1 Ch. 812. Cf. *The Hermione*, [1922] P. 162.

(*m*) *Fray* v. *Vowles*, *supra*.

(*n*) *Swinfen* v. *Chelmsford*, 5 H. & N. 890.

(*o*) *Strauss* v. *Francis*, L. R. 1 Q. B. 379; *Ellender* v. *Wood*, 32 Sol. Jo. 628; *The Alliance, etc.* v. *MacIvor & Co.*, 7 T. L. R. 599; *Lewis* v. *L.*, 45 Ch. D. 281; *Matthews* v. *Munster*, 20 Q. B. D. 141; An. Pr. (1928), p. 2010.

(*p*) *Prestwich* v. *Poley*, 18 C. B. (N.S.) 108; *Berry* v. *Mullen*, 5 Ir. R. Eq 368; *Re Newen*, [1903] 1 Ch. 812.

provided he acts *bona fide* and with reasonable care and skill, and the compromise is for the benefit of his client, and is not made in defiance of his express prohibition (*q*).

A consent to compromise given by counsel in the presence and with the sanction of his client may be withdrawn by leave of the Court before the order is drawn up, if given through error, mistake, surprise or inadvertence (*r*), but after that time it can only be set aside on the ground of common mistake (*s*); and a consent given by the authority of the client cannot be withdrawn unless there has been mistake or surprise (*t*).

Infants (*u*).—If the Court, having all the necessary facts before it, sanctions a compromise on behalf of infants, and it afterwards turns out that the Court was mistaken, the infants have no redress, it being an error of judgment for which there is no remedy. But if by suppression or misstatement of facts the Court has been led to an erroneous conclusion, the persons who have done this are amenable to justice, and the Court will, if possible, set aside the transaction as against the innocent party (*x*).

The ordinary practice in cases of compromise in which infants are interested is to direct a reference to Chambers as to whether the proposed compromise is beneficial : but if the Judge is satisfied on the evidence before him, that will suffice (*y*). Where an action is pending, the terms of the proposed compromise should as a rule be brought before the Court (*z*). The application is usually by summons, and where there is no action pending, the sanction is

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(*q*) *Chown* v. *Parrott*, 14 C. B. (N.S.) 74; *Re Newen*, *supra*; *Little* v. *Spreadbury*, [1910] 2 K. B. 658.

(*r*) *Holt* v. *Jesse*, 3 Ch. D. 177; *Rogers* v. *Horn*, 26 W. R. 432; *Hickman* v. *Berens*, [1895] 2 Ch. 638; *Harvey* v. *Croydon*, *etc.*, *infra*; *Re West Devon*, *etc.*, 38 Ch. D. 51; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534. But see *Little* v. *Spreadbury*, [1910] 2 K. B. 658; *Shepherd* v. *Robinson*, [1919] 1 K. B. 474.

(*s*) *Davis* v. *D.*, 13 Ch. D. 861; *Att.-Gen.* v. *Tomline*, 7 Ch. D. 389; *Furnival* v. *Bogle*, 4 Russ. 142; *Huddersfield B. Co.* v. *Lister*, [1895] 2 Ch., at p. 283; *Wilding* v. *Sanderson*, *supra*.

(*t*) *Harvey* v. *Croydon*, *etc.*, 26 Ch. D. 249; *Elsas* v. *Williams*, 52 L. T. 39.

(*u*) See generally as to the power of the Court to sanction compromises by persons under disability, *Cahill* v. *C.*, 8 A. C. 420, 426, 430; *Brooke* v. *Mostyn*, *infra*; *Re Wells*, [1903] 1 Ch. 848, 854; Seton (7th ed.), 943; Simpson (4th ed.), p. 327.

(*x*) *Brooke* v. *Mostyn*, 2 De G. J. & S. 373, 415 *et seq.*, reversed on another point, L. R. 4 H. L. 304; see also *Stainton* v. *The Carron Co.*, 6 Jur. (N.S.) 360; Simpson, 328.

(*y*) *Lippiat* v. *Holley*, 1 B. 423; *Wall* v. *Bushby*, 1 Bro. Ch. 484.

(*z*) *Gray* v. *Paull*, 46 L. J. Ch. 818; see *Re Birchall*, *infra*.

often obtained upon an originating summons under the provisions of the Rules of the Supreme Court, 1883, Order 55, r. 3 (f) (*a*).

The Court has no power to sanction a compromise against the opinion of the next friend, or the guardian *ad litem* and counsel, and if the next friend is exercising his discretion *bona fide* (*b*) he cannot be interfered with (*c*). Before sanctioning a compromise the Court requires an affidavit by the next friend or guardian, and by the solicitor, together with the written opinion of the junior counsel to the effect that they consider the proposed compromise for the benefit of the infants (*d*). On a petition for a compromise in which the interests of infants were concerned, the infants were not represented by a separate solicitor; the matter was ordered to stand over in order that they might be represented by an entirely independent solicitor, who could state that the compromise was for their benefit (*e*).

Married Woman.—The Court had jurisdiction to sanction, on behalf of a married woman, a compromise of a suit, to make a trustee liable for a breach of trust in relation to a fund in which the married woman has a reversionary interest not for her separate use (*f*). As to property to which she is entitled to her separate use, she can bind herself by a compromise (*g*). Having regard, therefore, to the alterations in the law by the passing of the Married Women's Property Acts, the Court's jurisdiction to sanction a compromise on behalf of a married woman has a very limited application. It is still of value, where there is a restraint upon anticipation; but in such cases application is now made under the Court's statutory (*h*), and not under its general, jurisdiction.

Absent Parties.—By a rule of the Supreme Court (*i*), it is provided that "where in proceedings concerning a trust a com-

(*a*) See as to Court's jurisdiction, *Re Wells*, [1903] 1 Ch. 848; Seton (7th ed.), p. 943.

(*b*) See *Rhodes* v. *Swithenbank*, 22 Q. B. D. 577; *Murray* v. *Sitwell*, [1902] W. N. 119. (*c*) *Re Birchall*, *infra*.

(*d*) *Re Birchall* (C. A.), 16 Ch. D. 41; *Gray* v. *Paull*, *supra*; Seton, p. 943.

(*e*) *Howe* v. *Robinson*, 34 Sol. Jo. 620.

(*f*) *Wall* v. *Rogers*, 9 Eq. 58. And see as to her separate property, though subject to restraint on anticipation, *Wilton* v. *Hill*, 25 L. J. Ch. 156; Seton, 896.

(*g*) *Besant* v. *Wood*, 12 Ch. D., at p. 622; and judgment of Selborne, C., in *Cahill* v. *C.*, 8 A. C., at p. 427.

(*h*) L. P. Act, 1925, s. 169, taking the place of section 7 of the C. A., 1911, which was an extension of section 39 of the C. A., 1881.

(*i*) R. S. C. Nov. 1883, Order 16, r. 9a.

promise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts" (*k*).

The Court under this rule may bind absent persons who have not assented to the compromise, but not such as have dissented from it, though it may sanction the compromise after making full provision for the rights of such dissentient parties (*l*). Where, however, all the parties are ascertained and are in England and it would not cause unreasonable expense or delay to serve them, there is no jurisdiction under the above rule to bind them (*m*).

Corporations and Companies.—A corporation or a company has, as incident to its existence, the same power of compromising claims made against it as an individual has (*n*), but *semble* in both cases, and certainly in the case of a company, it must bind itself by some formal proceeding—in the case of a company by the action of the directors, or by a resolution of the shareholders in a general meeting (*o*).

Enforcing Compromises.—The Court will specifically enforce private compromises of right provided there is a valid contract between the parties (*p*). It will also enforce by staying proceedings a compromise for putting an end to litigation (*q*), as in *Eden* v. *Naish* (*r*), where there was an agreement to compromise an action for the dissolution of a partnership after judgment therein; the terms were in writing and signed; the plaintiff alleged that he

(*k*) See *Saragossa, etc., Ry. Co.* v. *Collingham*, [1904] A. C. 159.
(*l*) *Collingham* v. *Sloper*, [1894] 3 Ch. 716 (C. A.).
(*m*) *Re Sadler's Settlement*, [1923] W. N. 260.
(*n*) *Re Norwich, etc., Society*, 8 Ch. D. 334; *Dixon* v. *Evans*, L. R. 5 H. L. 606; *Holsworthy U. D. C.* v. *Holsworthy R. D. C.*, [1907] 2 Ch. 62, 73.
(*o*) *Miles* v. *New Zealand, etc., Co.*, 32 Ch. D., at p. 286.
(*p*) *E.g.*, *Turner* v. *Green*, [1895] 2 Ch. 205.
(*q*) See Judicature Act, 1925, s. 41.
(*r*) 7 Ch. D. 781.

signed under a misapprehension; but upon a summons being taken out for a stay of proceedings on the terms of the agreement, an order for stay was made (*s*). So on motion for judgment (*t*). See as to enforcing undertakings by attachment or committal *Carter* v. *Roberts* (*u*).

In *Hart* v. *H.* (*x*) specific performance was ordered of an agreement to compromise a petition in the Divorce Court.

If a company is in liquidation a compromise entered into between the official liquidator and a stranger may be enforced by summons in the winding-up (*y*).

In *Smythe* v. *S.* (*z*) a compromise of certain divorce proceedings was made a rule of Court on an "*ex parte*" motion, the terms of the compromise providing that the agreement might be made a rule of the High Court. If such provision is not made it cannot be made a rule (*a*). A compromise may be enforced by motion in any Court in which pending proceedings are compromised (*b*).

If the intended compromise of an action fails, but the plaintiff has received some advantage, he will not be allowed to retain such advantage and continue the action (*c*).

Setting aside a Compromise.—A judgment, compromising an action, which has been passed and entered, cannot be set aside except by bringing a fresh action, unless (1) There has been a slip within R. S. C. 1883, Ord. 28, r. 11; (2) the judgment, as drawn up, does not correctly state the decision of the Court; (3) the parties consent (*d*). Different considerations may apply to interlocutory orders and judgments not passed and entered, but such applications are generally founded on allegations of fraud or

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(*s*) See *Pryer* v. *Gribble*, L. R. 10 Ch. 534; *Re Gaudet Frères*, 12 Ch. D. 882; *Scully* v. *Dundonald*, 8 Ch. D. 658.

(*t*) *Sharpe* v. *Wilmot*, 84 L. T. Jo. 297; *Baker* v. *Blaker*, 55 L. T. 723.

(*u*) [1903] 2 Ch. 312; and see *Taylor, Plinston Bros. & Co.* v. *Plinston*, [1911] 2 Ch. 605.

(*x*) 18 Ch. D. 670; and see *Lancaster* v. *L.*, [1896] P. 118.

(*y*) *Re Gaudet, etc.*, 12 Ch. D. 882.

(*z*) 18 Q. B. D. 544; Browne & Watts on Divorce, 31, 76.

(*a*) *Graves* v. *G.*, 69 L. T. 420, distinguished in *Howard* v. *H.*, 77 L. T. 140.

(*b*) *The Alliance, etc., Syndicate* v. *MacIvor, etc., Co.*, 7 T. L. R. 599; cp. *Re Scowby*, [1897] 1 Ch. 741.

(*c*) *Henderson* v. *The Underwriting, etc., Association*, 65 L. T. 616, 732; *Guy* v. *Walker*, 8 T. L. R. 314.

(*d*) *Ainsworth* v. *Wilding*, [1896] 1 Ch. 673; *Chessum & Sons* v. *Gordon* [1901] 1 K. B. 694, 699; see also *Re Scowby*, [1897] 1 Ch. 741; *Kemp-Welch* v. *K.-W.*, [1912] P. 82.

misrepresentation, and it is convenient that the evidence in support should be *viva voce* and not by affidavit (*e*).

2. Family Arrangements.

"From the case of *Stapilton* v. *S.* (*f*) down to the present day the current of authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into to preserve the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court, albeit, perhaps, resting upon grounds which would not have been considered satisfactory if the transaction had occurred between mere strangers" (*g*).

And a family arrangement may also be implied without any express written contract, from a long course of dealing between the parties (*h*).

Any transaction between father, tenant for life, and son, tenant in tail of property, entered into upon barring the entail, is looked upon in the nature of a family arrangement; and in such a case, apparent inadequacy of consideration, and the circumstance that the property is reversionary, will have but little weight. In *Cory* v. *C.* (*i*), on it appearing that one of the parties to an agreement to settle family disputes was drunk at the time that the agreement was entered into, Lord Hardwicke thought that there was not sufficient ground on which to set the agreement aside, it being reasonable, and the circumstances not showing that any unfair advantage of the party's drunkenness was taken. And he observed, that, "if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted,

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(*e*) See the judgment of Jessel, M.R., and Cotton, L.J., in *Gilbert* v. *Endean*. 9 Ch. D., at p. 266; *Mullins* v. *Howell*. 11 Ch. D., at p. 766; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

(*f*) See *Dunnage* v. *White*, 1 Swan., at p. 151; *Stewart* v. *S.*, 6 Cl. & Fin., at p. 967.

(*g*) *Per* Sugden, C., in *Westby* v. *W.*, 2 Dr. & War. 503; but see *Stockley* v. *S.*, 1 V. & B. 23; *Cood* v. *C.*, 33 B. 314; *Williams* v. *W.*, L. R. 2 Ch. 294; and the notes of *Huguenin* v. *Baseley*, and *Chesterfield* v. *Janssen*, *infra*.

(*h*) *Clifton* v. *Cockburn*, 3 My. & K. 76; *Williams* v. *W.*, L. R. 2 Ch. 294.

(*i*) 1 Ves. Sen. 19.

though there might be something of that sort, yet if the agreement be reasonable, the Court will not set it aside" (*k*).

In *Bellamy* v. *Sabine* (*l*) on an agreement between father and son, for disentailing an estate, and for a conveyance to the son in fee, the main consideration moving from the son was an undertaking to pay the father's debts; the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside as against the father, though the son was only just come of age, as a family arrangement of such a description could not be supposed to have depended upon a very exact calculation of the amount of debts (*m*).

"In regarding settlements of this character, claims to upset them, and the rights of parties thereunder, the Court gives weight to considerations which on other occasions would scarcely be allowed in the scale" (*n*). In re-settlements (*o*) it is a proper precaution to take care that the position of a son as tenant in tail is fully explained to him, and also the limitations of and burthens upon the property which are proposed to be made, and this either by the father's solicitor or an independent solicitor or counsel, and to omit these precautions is to incur risk (*p*). And in such cases the effect or extent of the parental influence (*q*) will not be regarded (*r*), unless where a father takes a benefit to the detriment of the son (*s*), when the Court may inquire whether there has been undue influence (*t*). Even if there is unfairness, the benefit being abandoned, the rest of the settlement may be allowed to stand (*u*). In *Hoblyn* v. *H.* (*x*), where the son had received the advice of an experienced estate agent, the resettled estate was exonerated from a charge in favour

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(*k*) And see *Wycherley* v. *W.*, 2 Eden, 175; *Persse* v. *P.*, 7 Cl. & Fin. 318; *Bruty* v. *Edmundson*, 113 L. T. 1197.

(*l*) 2 Ph. 425.

(*m*) See also *Hoghton* v. *H.*, 15 B. 278, 305, 306, where the law is fully considered by Romilly, M.R.; *Dimsdale* v. *D.*, 3 Drew. 556; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Hartopp* v. *H.*, 21 B. 259; *Head* v. *Godlee*, John. 536; *Jenner* v. *J.*, 2 De G. F. & J. 359.

(*n*) *Per* Kekewich, J., in *Hoblyn* v. *H.*, 41 Ch. D., at p. 204; see *Priestley* v. *Ellis*, [1897] 1 Ch. 489.

(*o*) See Vaizey, Settlements (1887), p. 1505.

(*p*) See *Hoblyn* v. *H.*; *Bruty* v. *Edmundson*, *supra*.

(*q*) *Hartopp* v. *H.*, 21 B. 266; *Dimsdale* v. *D.*, 3 Drew. 569.

(*r*) *Fane* v. *F.*, 20 Eq., at p. 706; *Turner* v. *Collins*, L. R. 7 Ch., at p. 340.

(*s*) See *Archer* v. *Hudson*, 7 B. 560; *Baker* v. *Bradley*, 7 De G. M. & G. 597.

(*t*) *Hoblyn* v. *H.*, 41 Ch. D., at p. 207; *Hoghton* v. *H.*, 15 B., at p. 314; *Jenner* v. *J.*, 2 De G. F. & J., at p. 375.

(*u*) *Hoblyn* v. *H.*, *supra*.

(*x*) *Supra*.

of the father and from a jointure given to the mother (*y*), but the rest of the re-settlement stood good.

Where a deed is honestly intended as a family arrangement, and not executed with the view of defeating creditors, it will be valid under 13 Eliz. c. 5, although some debts may be defeated thereby (*z*). But a deed, though valid as a family arrangement, may be void as against creditors (*a*).

If an arrangement between two parties is, on moral principles, fair, or is such as is sustainable, as between them, on the ground of its being a family transaction, it will not be rendered invalid because it may have been concocted and brought about by a third party, with a fraudulent intention of benefiting himself (*b*).

In a proper case a deed carrying into effect a compromise may be rectified. Thus where a deed was made for the purpose of carrying into effect a family arrangement, and it contained a declaration of trust inconsistent with the actual rights of the parties, and there was no evidence that the inconsistency was known to, or contemplated by, the parties or their solicitors, or that their actual rights were intended to be altered, it was held that the declaration ought to be varied (*c*).

It has been decided by the highest authority, that a compromise of a family dispute is not rendered invalid, in consequence of one of the parties not distinctly understanding his rights, if they were understood by his agents, by whose acts and knowledge, in the absence of fraud, the principal is bound (*d*), and the principle is the same in the law of Scotland as in the law of England and in the civil law (*e*).

Where a family arrangement is entered into upon the assumption that all the parties named in a deed will execute it, and one of them does not do so, it will not be binding upon the others although they execute it (*f*); and the result is the same where one of the parties,

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(*y*) See *Heron* v. *H.*, 2 Atk. 160; *Carpenter* v. *Heriot*, 1 Eden, 338.

(*z*) *Re Johnson*, 20 Ch. D. 389; see *Re Maddever*, 27 Ch. D., at p. 526; *Hance* v. *Harding*, 20 Q. B. D. 732; cf. *Re Parry*, [1904] 1 K. B. 129; *Re Pope*, [1908] 2 K. B. 169.

(*a*) *Penhall* v. *Elwin*, 1 Sm. & G. 258; *Re Parry*, *supra*; May (3rd ed.), 215, 216.

(*b*) See *Bellamy* v. *Sabine*, 2 Ph. 425; Kerr on Fraud (5th ed.), p. 17.

(*c*) *Ashurst* v. *Mill*, 7 Ha. 502; Kerr, 544.

(*d*) *Stewart* v. *S.*, 6 Cl. & Fin. 911; Kerr, 545. But see *Re Roberts*, [1905] 1 Ch. 704.

(*e*) *Stewart* v. *S.*, *supra*.

(*f*) *Peto* v. *P.*, 16 Si. 590; Leake (7th ed.), p 95.

from any incapacity, as, for instance, coverture, cannot execute the deed in a valid or binding form (*g*).

Where a bill alleged a judgment obtained by fraud and a subsequent compromise, and sought to have the whole transaction set aside on the ground of fraud or to have the compromise carried out, and in the opinion of the Court the case of fraud failed, the Court refused to enforce the compromise, and the whole bill was dismissed (*h*).

Letters written, after a dispute has arisen, with a view to a compromise and "without prejudice," cannot be used in evidence against the party by or on behalf of whom they were written. In *Hoghton* v. *H.* (*i*), Romilly, M.R., said, "that such communications made with a view to an amicable arrangement ought to be held very sacred; for if parties were to be afterwards prejudiced by their efforts to compromise, it would be impossible to attempt an amicable arrangement of differences" (*k*).

Husband and Wife.—In *Jodrell* v. *J.* (*l*) a singular deed between husband and wife was upheld as a family arrangement. In that case, a wife having instituted a suit against her husband for a divorce, an arrangement was come to, and the husband executed a deed, by which he assigned a house to trustees, upon trust to permit the wife to enjoy it and accommodate herself and children, and an income of £4,000 a year was also provided for her separate use, to keep up the establishment for herself and children, "upon such a scale, and regulated in such a manner, as she should think fit"; and the surplus was to be repaid to the husband. The deed provided, that so long as the husband should be desirous to reside in the house, "and to conform to the spirit and intention of the deed, and to partake of the benefit of the establishment to be kept up therein by the wife, he should be at liberty so to do." The suit was discontinued, and the husband partook of the establishment. Langdale, M.R., held, that the deed was not void on any ground of public policy; and that, being a family arrangement, and

(*g*) *Bolitho* v. *Hillyar*, 34 B. 180; and see *Taylor* v. *Cartwright*, 14 Eq. 167.

(*h*) *Cawley* v. *Poole*, 1 Hem. & M. 50.

(*i*) 15 B. 321. See *Cahill* v. *C.*, 8 A. C. 420; *La Roche* v. *Armstrong*, [1922] 1 K. B. 485.

(*k*) And see *Jones* v. *Foxall*, 15 B. 388, 396; *Re Monsell*, 6 Ir. Ch. R., at p. 254; and as to the general rule of evidence on this point, see *Paddock* v. *Forrester*, 3 Man. & G. 903; *Walker* v. *Wiltshire*, 23 Q. B. D. 335; *Re Daintry*, [1893] 2 Q. B. 116; *La Roche* v. *Armstrong*, *supra*.

(*l*) 9 B. 45.

a compromise of disputed rights, there was a sufficient consideration; that it was not void for uncertainty; and that the Court would enforce its due performance both by the wife and the husband.

With regard to the other points which were raised—want of consideration and the want of mutuality—Langdale, M.R., said : "I do not think that they ought to influence the mind of the Court at all. This is not a matter of pecuniary consideration, but a family arrangement,—a compromise of litigated rights between the parties."

It may be here observed that it has been settled that "the relation of husband and wife is not one to which the doctrine of *Huguenin* v. *Baseley* applies. In other words, there is no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor, is invalid" (*m*).

(*m*) *Per* Cozens-Hardy, J., in *Barron* v. *Willis*, [1899] 2 Ch., at p. 585. Although, on appeal, the decision in this case was reversed on the facts, the above passage in the judgment of Cozens-Hardy, J., has been approved in a number of later cases. See *Bank of Africa* v. *Cohen*, [1909] 2 Ch., at p. 135; *Howes* v. *Bishop*, [1909] 2 K. B. 390; *Westen* v. *Fairbridge*, [1923] 1 K. B. 667, 672.

CONSTRUCTIVE FRAUD (*a*).

HUGUENIN *v.* BASELEY.

1807. 14 V. 273; 9 R. R. 276.

Undue Influence—Voluntary Settlement obtained by an Agent.

Voluntary settlement by a widow upon the defendant, a clergyman, and his family set aside, as obtained by undue influence and abused confidence in the defendant, as an agent undertaking the management of her affairs; upon the principles of public policy and utility, applicable to the relation of guardian and ward.

The object of the bill in this cause was to set aside a conveyance made by the plaintiff Mrs. Huguenin, previously to her marriage with the other plaintiff, her second husband, as having been improperly and fraudulently obtained. The following are the principal circumstances established by evidence and admission, under which this relief was sought.

In 1803, Mrs. Huguenin, then Mrs. Hill, appeared to be entitled in fee simple to the manors of Cleydon and Hampton Gay, and other estates in Oxfordshire, under the ultimate limitation of the reversion by a will dated 1768, to her father, Richard Hindes, who had gone to Jamaica, where he acquired considerable property, real and personal, which upon his death also descended to her.

After some correspondence with their solicitors in England, she, in September, 1803, returned with her husband from Jamaica. He died in October, 1803; and in November, she being then about the age of forty, first became acquainted with the defendant, Thomas Baseley, a clergyman, who was also connected with the family of Hindes, and had with other persons, upon the death of the testator in 1798, instituted a suit claiming

(*a*) As to other cases of constructive fraud, see *Fox* v. *Mackreth*, *post*, Purchase by a Trustee; *Aleyn* v. *Belchier*, *post*, Fraud upon a Power; *Strathmore* v. *Bowes*, *post*, Fraud on Marital Rights.

Huguenin v. Baseley.

as heirs-at-law of Richard Hindes; in which cause an inquiry, directed by the Lord Chancellor, produced the title of Mrs. Huguenin as the only child of Richard Hindes.

The bill stated that the defendant Baseley, with the view of getting the control and management of the said estates, and of getting them ultimately settled upon himself, procured an introduction to Mrs. Huguenin; and having by various means ingratiated himself with her, represented that her solicitors had mismanaged and neglected her property, and induced her, then a stranger, having no friends or relations in England, and being quite ignorant of the value of property, to withdraw her affairs from those solicitors and to place them in the hands of the defendant; who, with such design, wrote the following letter, which she, by his inducement, caused to be copied and signed, and sent to the solicitors:

"Sirs,—Having been so unfortunate as to lose the best of husbands and the sincerest friend by the premature death of Mr. Hill, I feel myself, as it were, left in that unprotected state that I now want the assistance of some friend with whom I can advise in the adjustment of my affairs, and who will kindly interpose in seeing that my property is managed to the best advantage. From reflection, I have the greatest reason to believe that Providence has raised me up a friend, and that friend is Mr. Baseley, who will take upon him the trouble of bringing all my affairs into such a plan as I shall hereafter be enabled to conduct them with facility to myself. Impressed with this agreeable idea, I beg leave to inform you that I commit (subject to my own inspection) the perfect arrangement of my business with you into Mr. Baseley's hands; and hope that you will prepare, without any delay, every account that you have standing against me, with the deeds, etc., of the estate at Hampton. As I wish to leave London at Lady-day next, I must desire that no delay on your part will take place. Mr. Baseley will be ready to meet you on the business whenever you will appoint a day. With this determination, I remain, etc.

"Ann Hill."

Huguenin v. Baseley.

The deeds were accordingly delivered to Baseley, and were deposited by him with his solicitor. The bill farther represented that the defendant artfully dissuaded the plaintiff from residing in the house at Hampton Gay, and letting the estate, as she had proposed, and recommended to her a surveyor, who gave a very unfavourable account of the situation of the estate; and the defendant Baseley soon afterwards offered her £400 a year for a lease of the whole, clear of all expenses, and keeping the premises in repair, representing £420 a year as the utmost value, which was confirmed by his solicitor; that she executed the deeds under the persuasion of the solicitor that they were her will, and the lease to Baseley, and that she had no intention to give away or settle her estate, etc.

By the deed dated May 5, 1804, which was the subject of the bill, the plaintiff, Mrs. Huguenin, in consideration of 10s., conveyed the Hampton Gay estates to a trustee, his heirs and assigns, to the use that she and her assigns might, during her life, receive out of the said manor, etc., an annuity of £400, secured by a trust term of 500 years; and subject thereto, to the use of the defendant Baseley, for life, without impeachment of waste, with remainders to trustees to preserve contingent remainders to his wife for life, to their children, born or to be born, in tail, with cross remainders, and the ultimate remainder to Mrs. Huguenin. The value of that estate was rather more than £400 per annum.

The defendant, Thomas Baseley, by his answer represented that from the time of his first acquaintance with the plaintiff, a great intimacy took place, and she expressed a great affection for him and his family; that she complained of the conduct of her solicitors, declaring her intention of taking the management of her affairs from them; and upon her application, he recommended to her his solicitor and a surveyor, and she intimated to the defendant her intention of settling her estates on him and his family, and requested him to write to her solicitors, to acquaint them that she should take her affairs out of their hands; and the defendant at her request did in her presence, and with her sanction, and according to her directions, write the form of a letter for that purpose, which the plaintiff, as he believes, copied and sent to her solicitors; but the defendant positively denies

that such letter was written at his instigation, or by his desire; on the contrary, he wrote the same at the pressing desire of the plaintiff; and though the language of the letter was the defendant's, yet the substance was in fact dictated by her. In another part of the answer the defendant denied that he induced her to send that letter, stating his belief that it was written by him, but that it was so written at the particular instance and request of the plaintiff, who desired him to draw up such letter, as before mentioned; and he believes he did, upon that occasion, state to the plaintiff that, if it was her wish to discharge her solicitors, such letter ought to be in her own handwriting, as it would not be so proper for it to appear in his handwriting, and the plaintiff did copy such letter.

The answer further stated that the plaintiff frequently expressed to the defendant a wish to settle her affairs, and make a disposition of her property, inquiring whether the defendant was related to her, and who was her heir-at-law; and being informed, expressed a great dislike to that family. And after various conversations, she repeated her determination to settle the Hampton Gay estate on the defendant and his family; and in March, 1804, without any persuasion, suggestion, or influence, she gave instructions accordingly; and the defendant understood her intention to be, to settle the estate so as to reserve to herself a rent-charge for her life about equal to the reasonable rent; and that it was her wish that the defendant should go and reside there immediately with his family, so that the mansion house might be kept up; declaring that she would never reside there on account of the trouble of repairing, etc.; and the defendant denied all the charges of fraud, influence, etc.

The answer of the attorney who prepared the deed stated that, when instructed by her to prepare a settlement, he recommended to her to make a will, which might be revoked or altered; when she replied that she would not do it by will, on that account, as, if she should alter her situation, she intended it should not affect the settlement of her property. The defendant, according to the voluntary instructions of the plaintiff, prepared two deeds of settlement, *viz.*, that of May 5, 1804, as to the Hampton Gay estate, in the bill mentioned, and the other, dated June 21, 1804,

relating to all her other estates and property. In the former deed blanks were left for the plaintiff's rent-charge and the names of the trustees, and she made alterations as to the uses among Baseley's children, and as to the ultimate limitation, which originally was to Baseley in fee. That deed was settled, and the other prepared by counsel; and they were voluntarily and deliberately executed and the blanks filled up by her direction.

This answer farther stated that, in the deed of June 21, 1804, the defendant Thomas Baseley, and this defendant, and William Sleet, of Jamaica, were named trustees, and the estates and property therein comprised were conveyed and assigned upon trust during the life of the plaintiff, Ann Huguenin, to convey, etc., according to her appointment, and to her separate use, notwithstanding coverture; and, after her decease, for any future husband surviving her, for his life, with remainder to her children by any such marriage as tenants in common in tail, with cross-remainders; remainder to her mother, and William James Clarke and the survivor, and to the children of Clarke; with remainder to Thomas Baseley and the two other persons named as trustees, as tenants in common; and £5,000 was settled on Mary Ann Eliot; and she was directed, during her minority, to be brought up by Mrs. Baseley, who was to receive the interest of her fortune; £2,000 on Elizabeth Eleanor Clarke; £100 a year on Mrs. Hindes; £200 a year on William James Clarke; and by that deed are settled several estates in Jamaica, with the stock; several sums of money due from different persons; a leasehold estate in Middlesex; the Manor of Cleydon, in the county of Oxford, and all the estates real and personal, then late the property of Thomas Hindes, not before conveyed and settled by the plaintiff, and other estates real and personal, stated to be mentioned in the schedules.

This answer also denied all the charges of fraud, misrepresentation, etc.

Sir S. Romilly, Mr. Hollist, and Mr. Trower, for the plaintiff.—The authorities against permitting a transaction of bounty to take effect between persons standing in certain relations are

numerous. Among those relations, that of guardian and ward is not for this purpose confined to persons so related in a strict sense—as under an appointment of guardian by will, or by order of this Court; but the rule includes any person placing himself in that situation (*b*): * * * This is an instance of a very peculiar species of influence gained over the mind of this lady by no common means; appearing by the letter, written or dictated by the defendant for Mrs. Huguenin to copy, in terms which he cannot be supposed to use in the light and profane way that too frequently occurs. The English Courts of justice do not afford an instance of influence acquired by such means (*c*); but in foreign Courts such instances have occurred. According to Pothier, it has been decided, upon the same principles of public utility, that a confessor, or director of the conscience, a person to whom another trusted his spiritual concerns in matters of religion, cannot take any bounty from the person to whom he acts in that character, and the apprehension of the empire which these persons obtain, was carried so far that a gift to the order of which they were members was not allowed to have effect.

Mr. Richards, Mr. Fonblanque, Mr. Hart, Mr. Martin, Mr. Leach, and Mr. Wetherell, for the defendant.

Sir Samuel Romilly, in reply.—This bill puts the relief it prays directly upon the ground of undue influence, exerted by the means of spiritual ascendancy, distinctly charging that the defendant had taken upon himself to be the adviser of this lady, and the manager of her property, and stating the letter as an instance of that influence. But, divesting this case of that relation and influence, and considering it as the case of a stranger, the evidence of fraud or misapprehension is so strong that this transaction could not possibly stand. Upon all the evidence it cannot be represented that, when she executed the deed, she was apprised of its nature. How is her sudden change

(*b*) *Hylton* v. *H.*, 2 Ves. Sen. 547; *Pierse* v. *Waring*, cited 1 Ves. Sen. 38; 2 Ves. Sen. 548, stated from the Reg. Lib. in Mr. Cox's note, 1 P. W. 121, to the *Duke of Hamilton* v. *Mohun*; *Hatch* v. *H.*, 9 Ves. 292.

(*c*) See *Norton* v. *Relly*, 2 Eden, 286, an instance of undue influence acquired by a dissenting minister and unduly exercised, 9 R. R., at p. 282 (n.).

in so short a period, from great anxiety about this estate, to be accounted for but from the effect of a sort of fascination? Of what consequence was it to Mrs. Huguenin what repairs were to be done, what conditions were to be kept, according to the evidence, upon the supposition that she was parting with the estate for ever? The removal of her husband's corpse to be buried at Hampton Gay is another circumstance utterly inconsistent with the defendant's representation that she did not intend to remain the proprietor. Having a mother, a half-brother, and sister, she was not at a loss for an object of bounty. The evidence as to her conversation with the attorney, suggesting to her that a will would be revocable by a change of her circumstances, shows that she looked to the possibility of a second marriage. Her expression of satisfaction at having attained her object cannot be explained upon the supposition that she was giving away her estate, but may be accounted for if she was to get rid of the trouble attending it.

In these cases, one of the strongest circumstances is the appearance by one person of consulting only the interest of another, and neglecting his own. The passage in Cicero (*d*) is most applicable:—

"Totius autem injustitiæ nulla capitalior est quam eorum, qui, cum maxime fallunt, id agunt, ut viri boni esse videantur."

The duty imposed upon the defendant by merely undertaking the concerns of this lady, made it impossible for him to take the whole of her estate; for it is not necessary to go to the extent that he could not accept any bounty. He took upon him the entire management of her affairs—acting as her agent, receiving her rents, attending arbitrations, etc., etc. The rule is not confined to attorneys or persons entitled to reward. *Proof* v. *Hines* (*e*) was the case of a tradesman, who officiously interfered; *the relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another* (*f*); and this case discovers one of a very

(*d*) Cic. de Off., lib. 1, s. 13.

(*e*) Cas. t. Talbot, 111.

(*f*) See *Dent* v. *Bennett*, 4 My. & C. 277, where this proposition is approved of by Lord Cottenham.

peculiar nature,—influence obtained through the sacred character of a minister of religion. Though there is no case (*g*) in which the Court has proceeded upon such grounds, the general principle has prevailed, where the means of acquiring influence were much less powerful,—the respect of a child or ward for a parent or guardian. Pothier says, that, by a latitude of interpretation, proceeding upon principles of public utility, that ordinance, expressly concerning only a tutor or administrateur, has been extended to the master of a school; the director of the conscience; the physician, who is not permitted during his attendance to take a conveyance from the patient; and to other relations, in which authority or influence must be supposed to exist.

For the proper determination of this case, however, it is not necessary to rely on such authorities. The decisions of English Courts of justice are amply sufficient. The same doctrine, stated by your Lordship in *Hatch* v. *H.* (*h*), was laid down by Lord Chief Justice Wilmot, in *Bridgman* v. *Green* (*i*). There was in that case much evidence that the person was perfectly aware of what he was doing, and had repeatedly confirmed it. Upon that, Lord Chief Justice Wilmot's observation is, that it only tends to show more clearly the deep-rooted influence obtained over him (*k*). "In cases of forgery, instructions under the hand of the persons whose deed or will is supposed to be forged, to the same effect as the deed or will, are very material; but in cases of undue influence and imposition they prove nothing; for the same power which produces one, produces the other; and, therefore, instead of removing such an imputation, it is rather an additional evidence of it."

Having before (*l*) mentioned the distinction of the Roman law between liberality and profusion, he says, our laws strike no such boundary—"*stat pro ratione voluntas* is the law with us"; and this Court never did nor ever will annul donations merely as being improvident, and such as a wise man would not have made, or a man of very nice honour have accepted;

(*g*) See *Norton* v. *Relly*, 2 Eden, 286, *supra*.
(*h*) 9 V. 292.
(*i*) 2 Ves. Sen. 627; Wilm. 58.
(*k*) Wilm. 70.
(*l*) Wilm. 60, 61.

nor will this Court measure the degrees of understanding, and say, that a weak man, provided he is out of the reach of a commission, may not give as well as a wise man. But though this Court disclaims any such jurisdiction, yet where a gift is immoderate, bears no proportion to the circumstances of the giver, where no reason appears, or the reason given is falsified, and the giver is a weak man, liable to be imposed upon, this Court will look upon such a gift with a very jealous eye, and very strictly examine the conduct of the persons in whose favour it is made; and if it sees that any arts or stratagems, or any undue means have been used—if it sees the least speck of imposition at the bottom, or that the donor is in such a situation with respect to the donee as may naturally give an undue influence over him—if there be the least scintilla of fraud, this Court will and ought to interpose; and by the exertion of such a jurisdiction, they are so far from infringing the right of alienation, which is the inseparable incident of property, that they act upon the principle of securing the full, ample, and uninfluenced enjoyment of it.

The ground, as between guardian and ward, is put upon the danger, either of inducing guardians to flatter the passions of their wards, or of the improper exercise of their authority, as the relation of husband and wife is guarded from the effects both of indulgence and severity.

If this reasoning has any weight, does not the principle apply with infinitely greater force to the present case? What is the authority of a guardian, or even parental authority; what are the means of influence, by severity or indulgence, in such a relation, compared with the power of religious impressions under the ascendency of a spiritual adviser; with such an engine to work upon the passions; to excite superstitious fears or pious hopes; to inspire as the object may be best promoted, despair or confidence; to alarm the conscience by the horrors of eternal misery, or support the drooping spirits by unfolding the prospect of eternal happiness: that good or evil, which is never to end? What are all other means to these? Are inferior considerations to have so much effect; and is no regard to be given to the most powerful motive that can actuate the human mind?

Though no direct authority is produced, your Lordship, dispensing justice by the same rule as your predecessors, upon such a subject, not confined within the narrow limits of precedent, will, as a new relation appears, look into the principles that govern the human heart, and decide in a case, far the strongest that has yet occurred, upon this ground alone, from its infinite importance to the community.

November 23, 1807.

Lord Chancellor Eldon.—With regard to the interests of the wife and children of the defendant, there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons; and I should regret that any doubt could be entertained, whether it is not competent to a Court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridgman* v. *Green* (*m*) is an express authority, that it is within the reach of the principle of this Court, to declare that interests so gained by third persons, cannot possibly be held by them; and Lord Hardwicke observes justly, that if a person could get out of the reach of the doctrine and principle of this Court, by giving interests to third persons, instead of reserving them to himself, it would be almost impossible ever to reach a case of fraud. In that instance, therefore, the interest of the son was considered as capable of being affected by the decree as the interest of the father. The case afterwards came before the Lords Commissioners; and Lord Chief Justice Wilmot expresses himself thus (*n*):—

"There is no pretence that Green's brother, or his wife, was party to any imposition, or had any due or undue influence over the plaintiff; but does it follow from thence, that they must keep the money? No: whoever receives it must take it tainted and infected with the undue influence and imposition of the person procuring the gift: his partitioning and cantoning

(*m*) 2 Ves. Sen. 627; Wilm. 58.

(*n*) Wilm. 64.

it out amongst his relations and friends will not purify the gift, and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it."

This was also the doctrine of Lord Thurlow, in the case that has been referred to: *Lutterel* v. *Lord Waltham*, sometimes cited as *Dixon* v. *Olmius* (*o*); and, though it was not practically acted upon, Lord Thurlow was inclined to carry it farther. The object of the bill in that case was, that an estate should be enjoyed as if a recovery had been suffered, upon the ground that Lutterel had, while Lord Waltham was, upon his death-bed, engaged in suffering a recovery, prevented it with the view that the estate should devolve upon the person with whom he was connected. The estate was by the law vested in that individual: a much stronger case, therefore, than the acquisition of property through imposition. Lord Thurlow, whatever might have been his final decision upon that case, had no doubt that it was against conscience, that one person should hold a benefit which he derived through the fraud of another; and I have reason to know that his Lordship would not have discussed the case so much at large, if it had been no more than that. These plaintiffs, therefore, if entitled to relief against Baseley, are equally entitled against all the branches of his family.

Then, as to persons concerned in these transactions, I agree with the argument, that it is not upon the feelings which a delicate and honourable man must experience, hearing these instruments, taken altogether, as I think myself bound to take them, nor upon any notion of discretion in this Court to prevent a voluntary gift, by a man stripping himself entirely of his property, if undue influence is not imputed, that any Judge sitting here has ever thought himself at liberty to interpose. I agree, further, that the relief must proceed upon what is alleged and proved by the person complaining; that their complaints must be treated as effectual or ineffectual, according to

(*o*) 1 Cox, 414.

what they have, not what they could have, represented: also, as to the defence, it may frequently happen that many passages may have taken place in the course of the transaction that are not brought into view; but the case must be dealt with as it is alleged and proved. I have, therefore, looked through this bill with reference to the frame of it, and I have no doubt this case might have been more clearly reached, if the situation of the parties had enabled them to go through all the difficulties as to amendment; also, that many circumstances might have been brought forward on behalf of the defendants, which I am bound not to look at; but taking the case as it stands, though there is in this bill much foul allegation, which, if not true ought not to be there, and a great deal of which is denied, and clearly disproved, there is enough upon the bill and in evidence, to show that this deed cannot stand, if the whole transaction, taken together, cannot stand.

This bill seeks relief only as to the deed of May, 1804. The deed of June relates to other estates; unquestionably has very different provisions, for very different persons; reserving a degree of dominion, and considerable dominion, to Mrs. Huguenin over that property; and I am disposed to think, that deed could not be made the subject of the same bill: at least, that it was not necessary to complicate this cause by making that a subject of the relief prayed. But the view I take of this case is this: that, attending to the effect of the letter, the evidence of the transactions among these parties, and attending more especially to the evidence of the attorney, the defence rests in a great measure upon this: that the Court is, by the nature of the defence, required to look at this deed, not merely by itself, but as being more or less justified with reference to the whole of the transactions, in the course of which it was executed; and it is much the same as if the defendant had said, he puts his case, not upon that instrument merely, but as part of a general arrangement of the plaintiff's affairs; and that the deed is to be considered with regard not merely to its own contents, but to the whole transaction, of which this deed forms a part.

The great body of evidence shows the alarm of this lady at

the trouble of taking possession of an estate dilapidated. Upon the evidence, until November, 1803, she had no acquaintance whatsoever with Baseley. Her age was about forty. She had left in the West Indies a mother; had great regard for a female child, Mary Ann Eliot; and had also a natural half-brother, named Clarke, of the age of sixteen, in whose education she appears to have been much interested. She brought him over to England; placed him with Mr. Baseley at an expense to herself of £200 a year. Her brother-in-law, Benjamin Hill, states that he, previously to the introduction of Baseley, managed her concerns; and that, until after that introduction, she expressed her entire satisfaction with the care of the solicitors in whose hands her affairs in this kingdom were placed, which is confirmed by another witness. The bill charges Baseley with infusing into her mind great dissatisfaction with the management, and the want of professional skill and care of those solicitors. The inference that this dissatisfaction was created in her mind by Baseley, is too strong: that she entertained that dissatisfaction is clear: that Baseley did not discourage it, that he gave in to it, is in evidence: that he created it, I cannot say: that he participated in, and acted upon it with her, is clearly established.

In October, preceding the month of January when her affairs were taken out of the hands of those solicitors, her husband, who came with her to England, died. She lived with, or was frequently with the two brothers of her deceased husband. The answer, therefore, stating that she was not without friends in this country is material; but in this view only, that it could be supposed she had ever consulted with them. There is, however, no evidence, that either Baseley ever stated to them what she proposed to do, or that the attorney concerned in the transaction, as Lord Chief Justice Wilmot says, felt the obligation of talking both with the grantor and the grantee, before this proposition was carried into effect. Benjamin Hill, one of her brothers-in-law, laid aside all the business after the solicitors were discharged; and as to George Hill, though there is evidence that she did declare her purpose, it was in conversations, in which it was suggested to them both, and that ample provision was

to be made for their children, which I fear had some influence with them. No such provision, however, was made.

It is doubtful, upon the report, whether Mrs. Huguenin had the immediate means of acting with the freedom of an affluent person. At the date of the report, the rents remained to be accounted for by Baseley, to the amount of £300 or £400. After the date of that report, small sums were lent to her: she had not even then paid the costs of the deed; she had borrowed £100 from the attorney; and there is one item of £57, advanced by Baseley after June, 1804, to discharge her husband from an arrest. Certainly, therefore, she was not in a condition of immediate affluence. Under the influence of her dissatisfaction at the conduct of the solicitors, in January, 1803, either she adopted the resolution of dismissing them, and placing the whole management of all her concerns in the hands of Baseley, calling upon him to assist her in executing it, or it was suggested to her by Baseley. My opinion is, that the weight of the evidence, which does not agree upon this, is, that she called upon Baseley, and desired him to assist her in executing that purpose of her own. If the proposition was her own, yet the transaction, in a Court of justice, has this character at least, that it was demonstration to Baseley that she placed confidence in him, as high as one individual ever placed in another. Where the evidence is contradictory, the fairest way to the defendant is to take his own account; and his answer represents it thus, that she called and requested him to write a letter to the solicitors; and at her request he did, in her presence, with her sanction, and by her direction, write the form of a letter, which he believes she copied and sent to them; but he positively denies that it was written at his instigation or by his desire, and says he wrote it at her pressing desire; and though the language was his, the substance was hers. Who dictated that letter is of very little importance. If at her dictation he wrote it, and permitted her to send it, that is the most direct communication to him of the nature and extent of the confidence she placed in him; and the language of a Court of justice has in all times been, *that, if a man does not choose to act upon the confidence appearing in the course of the transaction to be so reposed in*

him, he ought to reject it as soon as proposed. This letter is, therefore, upon the answer, to be taken as expressing her sentiments in his language. The effect of it is, at least, a communication to him of the information that she was unprotected by the death of her husband; that she wanted assistance for the purpose of advising her in the adjustment of her affairs; that she wanted that friend whom Providence had raised up for the purpose of kindly interposing in seeing that her property was managed to the best advantage, and her affairs brought into such a plan that she could conduct them with facility to herself.

This letter produced from the solicitors, rather too hastily, a total severance of themselves from the concern; and Baseley entered, to a certain degree at least, upon the management of them. The purposes expressed and alluded to in that letter, cannot mean that all her estate should be given away: that she was to be enabled to conduct her affairs with facility by giving up all her title. The attorney, who states that he was satisfied that she had made up her mind as to all her affairs, prepared in June these two deeds, conveying this estate, worth at that time, at the lowest calculation, £420 a year, which Annesley wished to purchase upon the supposition that it was worth £610 a year, subject to a rent-charge to herself, with a term in trustees to secure it to Baseley for life; with remainders to Mrs. Baseley for life, and to all their children, born or to be born, and the ultimate limitation to Mrs. Hill. A deed was prepared at the same time, which appears intended to be a conveyance of all her property, but which they were very much perplexed to describe, conveying all her freehold estates in the West Indies and everywhere, none of the parties knowing what they were; all the leaseholds for lives mentioned in a schedule, of which there are none; and all the leaseholds for years, of which there are some, to her for her separate use for life; with remainders to the husband whom she should marry, surviving her, and to Mrs. Hindes, and young Clarke and his children; and the ultimate limitation, for what reason is not explained, to Baseley and the attorney, and a person resident in the West Indies: this co-temporaneous deed permitted to be made

by her, having in contemplation a second marriage, which appears upon the deed itself.

To the question, whether these instruments being such as I have represented them, the consequence is, that this Court shall undo them, I answer, no, *if they are the pure, voluntary, well-understood acts of her mind;* but if they have not that character, if they are the result of her notion, that this is the true effect of that friendly assistance, that kind providential interference to which she was looking for the management of her affairs with advantage and facility to herself; if the conveyance was executed under the effect of that, which has always been considered in this Court as undue influence, if the deeds themselves, which are the best evidence, demonstrate, and if they are confirmed by extrinsic evidence, that they are not the pure, well-understood acts of her mind, this Court will undo them.

Has an instance ever occurred that a person, situated as this lady, was permitted to execute such instruments as these, with a purpose of marriage demonstrated upon one of them, and having a mother, and other persons whom she regarded with affection and anxiety for their welfare in life? Lord Hardwicke reasons with great force as to the voluntary deed, upon the same principle which induced me to ask, how it happens that there is no power of revocation in this instrument. There was in that deed a power of revocation: but it was a power to revoke in the presence of three persons, who, perhaps, never could be got together, which was therefore considered as if there had been no power of revocation; and the want of such power was considered strong evidence that the party did not understand the transaction, whence arose a strong inference of an undue purpose. There is in this case an attempt to show why there was not a power of revocation; and that is a part of the transaction one of the most liable to objection. The evidence and answer of the attorney go to this distinctly, that she informed him she was to have all her affairs arranged. He was struck with the circumstance of her making an irrevocable deed, and told her that she should make a will. When she said that this was to be a permanent arrangement, is it too

much to say the attorney permitted himself to be surprised into an act depriving her of her property for the benefit of Baseley's family, and for no provident or wise purpose fettering all her other property by the various limitations in the other deed? I do not say instruments are to be set aside by the want of great delicacy in the person who prepared them: but I am bound to look at all the circumstances that led to the execution of a voluntary instrument, and to observe that the attorney did not state this improvident act to the brother of this lady, or, as Lord Chief Justice Wilmot says (*p*), go and talk both to the grantor and grantee upon it. What she said to him must have suggested to him a reason for resisting more strenuously. The Court cannot pay attention to such circumstances as are alleged upon this part of the case.

The deed, being drawn by the attorney, was laid before a conveyancer, and the simple question put was, whether a fine and recovery were necessary. Why that should be thought of I do not know, as she had the remainder in fee simple vested in possession. Some observation occurs upon the contents of that instrument. Her annuity of £400 is merely reserved, payable quarterly, not secured by any personal obligation. The three trustees and the rent-charge are left in blank before the deed was laid before counsel, and the filling up those blanks is left to Baseley and herself; and the power of changing the trustees does not depend upon her pleasure, but is only given in the cases of inability or refusal to act. The reason that there is no power of revocation is, that the gentleman before whom the draft was laid thought his business was to execute the intention of the parties. There is a difference of opinion upon that, other gentlemen thinking some observation necessary. Upon the instructions for the other deed, however, they do not intimate that there is to be any power of revocation, or that she is to have any power to alter the uses. Not a word is dropped upon the subject. But by that deed this lady, who was so shocked at the notion of having a provision that was not to be permanent, has the power of making a deed or will

(*p*) Wilm. 69.

to alter completely these uses. Is there any evidence showing why that power should be there?—a power not to revoke the uses, but much less convenient, yet open to all the objections that she could have to a temporary instrument, as not binding herself down.

Other observations occur upon these instruments. This latter deed, in the limitation as to all the estates, provides an interest to a husband surviving, and to her children. According to the instructions, as to all the money property (and they settle property in the funds, though there was none), they omit the provision for the husband and children, which, however, they thought they had inserted, as there is, afterwards, a provision upon failure of children. Another circumstance as to the instrument of June 21, 1804, is that the instructions as to the trustees' names mention Baseley, the attorney, Sleet, and Anderson; and the insertion of Anderson is material. It is proved that she frequently visited him, and he is named as a trustee; but his name is afterwards struck out. Clearly, at the time of the instructions, it was not intended that there should be an ultimate limitation to the trustees for their own use; but they were to be trustees for undefined purposes. The deed was originally drawn so expressing the trust to be for such uses as they should think necessary and proper; but that was afterwards struck out, and the use for the benefit of the trustees themselves substituted.

It does not rest there. Suppose these transactions entirely separate. Proposing to put under the fetters of these limitations all her considerable West India and other property, for the purposes of facility of management, and putting it out of her own reach, she is permitted to place her West India property under the care of a clergyman and an attorney in England, and a person resident in the West Indies. The power of management is certainly stated to be for her life, subject to her control; how efficacious, every one knows, without any control whatsoever after her death. The management is perfectly *ad libitum*, to lease and carve out of the estates other interests; and they have all discretionary powers as to the children, Mary Eliot, and Clarke; and she could not change any of the trustees without

executing that power which it is supposed she had determined not to have.

If such is the nature of these deeds, and the defendant, according to the letter that is in evidence, permitted her to suppose that he was to take the management for her benefit, without considering what an agent engaged for reward can do, the known doctrine is, that the fruit of that relation, if it was not absolutely dissolved, cannot be permitted to subsist. Then, was the relation dissolved? Look at the transactions from the date of the letter to the end of the year: possession taken, and her anxious wish that Baseley should be the occupier, proved; her satisfaction expressed at seeing the house repaired; her declarations that she could not possibly think of undertaking that trouble; and that it was with exultation and satisfaction, as some of the witnesses express it, that she got rid of the estate; that it was no object to her; that she had so much property, it was a subject of delight to her that Baseley was to occupy that which was given to him. Take it that she intended to give it to him, it is by no means out of the reach of the principle. *The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which, from their situation, and relation with respect to her, they were bound to exert on her behalf.* Her situation, with reference to pecuniary circumstances during the whole period, must also be attended to, her husband, a few weeks before, having been relieved from distress by a sum of money advanced by Baseley.

In that view of the case, no evidence out of these instruments could satisfy me that Mrs. Huguenin understood them. I believe further, that the parties to the transaction did not understand it. Repeating therefore, distinctly, that this Court is not to undo voluntary deeds, I represent the question thus—whether she executed these instruments not only voluntarily, but with that knowledge of all their effect, nature, and consequences, which the defendants Baseley and the attorney were bound by their duty to communicate to her, before she was suffered to execute them; and though, perhaps, they were not

aware of the duties which this Court required from them in the situation in which they stood, where the decision rests upon the ground of public utility, for the purpose of maintaining the principle, it is necessary to impute knowledge which the party may not actually have had. These parties, therefore, cannot possibly hold the benefit of these instruments.

As to the costs, the same principles of public utility that require me to decree that these instruments shall be delivered up, compel me to make that decree at the cost of the defendant. As to ordering the deeds and papers to be delivered up, I have not, upon this form of the bill, authority to examine here the contents of the rest of the attorney's bill of costs, who, by happening to be engaged in a transaction that cannot be maintained, would not lose his lien upon the papers with reference to other transactions. If, however, Mrs. Huguenin ought not to have been permitted to execute the deed, I am bound by the principle established in *Bridgman* v. *Green* (*q*), and other cases, to hold, that if an attorney thinks proper to do more than obey the instructions which he ought not to have permitted to take effect, the Court has frequently said that it is not sufficient; and if he has not only carried into execution an intention which he ought not to have permitted to take effect, but has also taken to himself an advantage with respect to the property, persons not being consulted who ought to have been consulted (alluding to the ultimate limitation to the trustees), it deserves serious consideration whether he shall not pay the costs if the others cannot. If, however, these papers are to be delivered up on payment of the attorney's bill, he cannot be permitted to charge for drawing instruments which the decree says ought not to have been executed.

One circumstance now occurs to me, which I shall notice, that it may not be supposed to have escaped me. If there is anything like consideration, it is the consideration that arises out of the circumstances that Baseley would repair and lay out money upon the estate. If that had been expressed, it would have amounted to so little, as valuable consideration, that the

(*q*) 2 Ves. Sen. 627; Wilm. 58.

Court would not have been justified in paying much attention to it; but I cannot find in any of these cases in which a deed has been affected on account of undue influence, that the Court has ever attended to anything supposed merely to oblige the parties, if not expressed.

NOTES.

1. Generally.
2. Where undue influence is presumed from the relation between the parties, p. 226.
3. Where there is no special confidential relationship between donor and donee, p. 240.
4. How far the Court will interfere as against third parties, p. 242.
5. Delay, acquiescence, confirmation, p. 245.
6. Gifts by will, 245.

1. Generally.

Huguenin v. *Baseley* is a leading case on the jurisdiction of equity, to set aside, upon the principle of general public policy, voluntary donations "inter vivos," obtained by persons standing in some confidential, fiduciary, or other relation towards the donor, in which dominion may be exercised over him. Other instances of constructive fraud dealt with in these volumes are, fraud upon marital rights, *Strathmore* v. *Bowes*, see "Husband and Wife"; fraud upon a power, *Aleyn* v. *Belchier*, see "Powers"; purchase by a trustee from his *cestui que trust*, *Fox* v. *Mackreth*, see "Trusts (Constructive)."

The word "Constructive" negatives *actual* fraud, but affirms that the actual conditions will have similar consequences (*r*). Constructive fraud includes that vast number of cases in which transactions are disallowed, not on account of any evil design or contrivance to perpetrate a positive fraud or injury upon other persons, but because they are contrary to some general public policy, or to some fixed artificial policy of the law (*s*). "Fraud, in my opinion, is a term that should be reserved for something dishonest and morally wrong, and much mischief is, I think, done, as well as much unnecessary pain inflicted by its use

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(*r*) Pollock, Contracts (9th ed.), p. 566.
(*s*) See Story's Eq. Jur., s. 258.

where 'illegality' and 'illegal' are the really appropriate expressions" (*t*).

"The relief . . . stands upon a general principle, applying to all the variety of relations in which dominion may be exercised by one person over another:" (*u*) "The obtaining of property, or of any benefit, through the undue and unconscientious abuse of influence by a person in whom trust and confidence are placed, has always been treated as a fraud of the gravest character" (*x*).

Courts of equity will not, however, arrest or set aside an act or contract merely because a man of more honour would not have entered into it. They do not sit as *custodes morum*, enforcing the strict rules of morality. But they do sit to enforce what has been called a technical morality. If confidence is reposed it must be faithfully acted upon, and preserved from any admixture of imposition. If influence is acquired it must be kept free from the taint of selfish interest, and cunning, and overreaching bargains. If the means of personal control are given, they must be always restrained to purposes of good faith and personal good (*y*).

Lindley, L.J., in *Allcard* v. *Skinner* (*z*), thus classifies the cases in which equity invalidates voluntary gifts, pointing out that the two groups often overlap.

(1) Cases in which there has been some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by a donee placed in some close and confidential relation to the donor (*a*).

(2) Cases in which the position of the donor to the donee has been such that it has been the duty of the donee to advise the donor, or even to manage his property for him. In such cases the Court throws upon the donee the burden of proving that he has not abused his position, and of proving that the gift made to him has not been brought about by any undue influence on his part. In this class of cases it has been considered necessary to show that the

(*t*) *Per* Wills, J., *Ex p. Watson*, 21 Q. B. D., at p. 309; and see judgment of Kay, J., in *Fry* v. *Lane*, 40 Ch. D., at p. 324.

(*u*) *Dent* v. *Bennett*, 4 My. & C., *per* Cottenham, C., at p. 227.

(*x*) *Per* the C. A. in *Moxon* v. *Payne*, L. R. 8 Ch., at p. 887.

(*y*) Cf. Story, Eq. Jur., § 308 *et seq.*; Pollock, Contracts (9th ed.), p. 656; Kerr (5th ed.), p. 193.

(*z*) 36 Ch. D., at p. 181.

(*a*) *Norton* v. *Relly*, 2 Eden, 286; *Nottidge* v. *Prince*, 2 Gif. 246; *Lyon* v. *Home*, 6 Eq. 655; *Whyte* v. *Mead*, 2 Ir. Eq. R. 420. And see *Morley* v. *Loughnan*, [1893] 1 Ch. 736.

donor had independent advice, and was removed from the influence of the donee when the gift was made to him.

The question in the second group of cases is not whether the donor knew what he was doing, had done, or proposed to do, but how the intention was produced : " Whether all that care and providence was placed around him, as against those who advised him which, from their situation and relation with respect to the donor, they were bound to exercise in his behalf " (*b*). In these cases it is the duty of the donee to advise and take care of the donor, and where there is no such duty the language of Lord Eldon ceases to be applicable (*c*).

" To protect people from being forced, tricked, or misled in any way by others into parting with their property, is one of the most legitimate objects of all laws; and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny, and with the infinite varieties of fraud " (*d*).

But where a gift is made to a person standing in a confidential relation to the donor, the Court will not set aside the gift, if of a *small amount*, simply on the ground that the donor had no independent advice; otherwise if the gift is so large as not to be accounted for on the ground of friendship, charity, etc. (*e*).

What amounts to Undue Influence.—" As no Court has ever attempted to define fraud, so no Court has ever attempted to define undue influence, which includes one of its many varieties " (*f*). It will be a question for the Judge to decide, upon the circumstances of each particular case, and such circumstances as the non-intervention of a disinterested person, or professional adviser on behalf of the donor, especially if the donor is, from age or weakness of disposition, likely to be imposed upon (*g*); the statement of a consideration, where there was actually none (*h*);

(*b*) See judgment of Lindley, L.J., in *Allcard* v. *Skinner*, 36 Ch. D., at p. 182.

(*c*) Lindley, L.J., *Allcard* v. *Skinner*, *supra*. But see *Re Coomber*, [1911] 1 Ch. 723.

(*d*) *Per* Lindley, L.J., *Allcard* v. *Skinner*, 36 Ch. D., at p. 183.

(*e*) *Rhodes* v. *Bate*, L. R. 1 Ch. 258; *Allcard* v. *Skinner*, 36 Ch. D., at p. 185

(*f*) *Per* Lindley, L.J., *Allcard* v. *Skinner*, 36 Ch. D., at p. 183.

(*g*) *Griffiths* v. *Robins*, 3 Madd. 191; *Dent* v. *Bennett*, 4 My. & C. 269; *Harvey* v. *Mount*, 8 B. 439; *Page* v. *Horne*, 11 B. 227; *Dutton* v. *Thompson*, 23 Ch. D. 278.

(*h*) *Hawes* v. *Wyatt*, 3 Bro. Ch. 156; *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Sharp* v. *Leach*, 31 B. 491.

the absence of a power of revocation (*i*); the improvidence of the transaction (*k*), furnish a probable though not always a certain test of undue influence or fraud (*l*).

Sir F. Pollock, in his work on the Law of Contracts, thus states the equitable doctrine on this subject: "Any influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment, is considered by Courts of equity, in respect of gifts 'inter vivos,' to be undue influence, and is a ground for setting aside the act procured by its employment" (*m*).

2. Where Undue Influence is presumed from the Relation between the Parties.

Where a relation of confidence is shown to exist, or is presumed from the position of the parties, then the law on grounds of public policy presumes that the gift was the effect of influence induced by these relations, and *the burden lies on the donee* to show that the donor had independent advice, or adopted the transaction after the influence was removed, or some equivalent circumstances (*n*). And although the donor is of full age and capable of managing his affairs, and the gift is made without proof of any actual exercise of power or influence, and although as a fact no unfair advantage is taken of him, and no undue influence is brought to bear upon him by the donee, and although the gift is not for the private advantage of the donee, but for legitimate purposes, for which it has been used, yet the Court, from the special relationship which exists between the parties, will infer the existence of influence, and in the case of large gifts, not to be reasonably accounted for on the ground of friendship, relationship, etc., will

(*i*) *Coutts* v. *Ackworth*, 8 Eq. 558; *Wollaston* v. *Tribe*, 9 Eq. 44; *Everitt* v. *E.*, 10 Eq. 405; but see cases in (*l*), *infra*.

(*k*) *Harvey* v. *Mount*, 8 B. 439.

(*l*) *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *Hall* v. *H.*, L. R. 8 Ch. 430; *Armstrong* v. *A.*, 8 Ir. R. Eq. 1; *Re Coomber*, [1911] 1 Ch. 174; *ibid.* 723.

(*m*) Pollock (9th ed.), 648; and see as to wills, *infra*, "Gifts by Will."

(*n*) See *Hunter* v. *Atkins*, 3 M. & K. 135; *Cooke* v. *Lamotte*, 15 B. 241; *Morley* v. *Loughnan*, [1893] 1 Ch., at p. 752; *Wright* v. *Vanderplank*, 8 De G. M. & G. 136; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Parfitt* v. *Lawless*, L. R. 2 P & D. 462; *Liles* v. *Terry*, [1895] 2 Q. B. 679; *De Witte* v. *Addison*, 30 L. T. 207.

throw upon the donee the burden of supporting the gift, by proving that the donor had, or could have had if he had wished it, independent advice, and was free to act upon it when given (*o*). But it is not correct to say that any confidential relation between donor and donee is sufficient to set up a presumption against the validity of the gift. "There are confidential relations in which there is a presumption of undue influence. Take the case of solicitor and client. . . . Another instance is where a young person, immediately after attaining twenty-one, makes a gift to a parent or a person standing *in loco parentis*. When a gift is made under such circumstances, there is a presumption of undue influence which requires something to rebut it; but to apply that to every fiduciary relation and every relation of confidence is, I venture to think, not according to authority and distinctly contrary to principle" (*p*).

The Court has declined to fetter the rule by any enumeration of the description of persons against whom it ought to be freely used (*q*). The principle upon which equity will give relief as against the persons standing in the following special relations to the donor, will be extended and applied *to all the variety of relations in which dominion may be exercised by one person over another* (*r*). In these cases the age or capacity of the donor, or the nature of the benefit are of little importance. The point is, had he independent and competent advice? (*s*). When such a relation is established, the Court will presume its continuance unless its determination is distinctly proved (*t*).

Parent and Child, and persons in loco parentis.—In *Carpenter* v. *Heriot* (*u*), where a father having advanced a child in his infancy, upon his coming of age took a bond from him to a greater amount

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(*o*) See judgment of Cotton, Lindley and Bowen, L.JJ., in *Allcard* v. *Skinner*, 36 Ch. D. 145, *passim*; *Archer* v. *Hudson*, 7 B. 551; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Demarara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673.

(*p*) *Per* Cozens-Hardy, M.R., in *Re Coomber*, [1911] 1 Ch. 726, 727.

(*q*) *Per* Cottenham, C., in *Dent* v. *Bennett*, 4 My. & C. 277.

(*r*) *Per* Cottenham, C., in *Dent* v. *Bennett*, 4 My. & C. 277. And see *Smith* v. *Kay*, 7 H. L. Cas. 750; *Tate* v. *Williamson*, 1 Eq., at p. 536; L. R. 2 Ch., at p. 61.

(*s*) *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Powell* v. *P.*, [1900] 1 Ch. 243; *Willis* v. *Barron*, [1900] 2 Ch. 124; [1902] A. C. 271; *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*t*) *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Mitchell* v. *Homfray*, 8 Q. B. D. 592; and see *Tate* v. *Williamson*, L. R. 2 Ch. 61; *Bank of Montreal* v. *Stuart*, [1911] A. C. 120; *Demarara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673.

(*u*) 1 Eden, 338.

than the sums advanced, and which it appears the son was totally unable to pay, Lord Keeper Henley held that the bond was obtained by parental influence, and decreed that it should not stand as a security for the sums advanced, but be set aside altogether. "A man of mature age and experience can make a gift to his father or mother because he stands free of all overriding influence except such as may spring from what I may call filial piety: but a young person (male or female) just of age requires the intervention of an independent mind and will, acting on his or her behalf and interest solely, in order to put him or her on an equality with the maturer donor who is capable of taking care of himself" (*x*).

The same principles are applicable to a person obtaining a voluntary gift, who has put himself *in loco parentis* towards the donor. Thus, in the case of *Archer* v. *Hudson* (*y*), a niece, two months after she came of age, and after her guardians had fully accounted to her, entered into a voluntary security for her uncle, by whom she had been brought up, and who was considered by the Court as standing *in loco parentis*. Langdale, M.R., set aside the security. "Nobody," observed his Lordship, "has ever asserted that there cannot be a pecuniary transaction between a parent and child, the child being of age; but everybody will affirm in this Court that, if there be a pecuniary transaction between parent and child, just after the child attains the age of twenty-one years, and prior to what may be called a complete 'emancipation,' without any benefit moving to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child; and that it is the business and the duty of the party who endeavours to maintain such a transaction, to show that that presumption is adequately rebutted; and that it may be adequately rebutted is perfectly clear. This Court does not interfere to prevent an act even of bounty between parent and child; but it will take care (under the circumstances in which the parent and

(*x*) Farwell, J., in *Powell* v. *P.*, [1900] 1 Ch., at p. 246; see also *Cocking* v. *Pratt*, 1 Ves. Sen. 401; *Wright* v. *Vanderplank*, 8 De G. M. & G. 133; *Potts* v. *Surr*, 34 B. 543, 552; *Davies* v. *D.*, 4 Gif. 417; *King* v. *K.*, 3 Jur. (N.S.) 609, 611; *Chambers* v. *Crabbe*, 34 B. 457; *Heron* v. *H.*, 2 Atk. 160; *Hawes* v. *Wyatt*, 3 Bro. Ch. 156; *Hoghton* v. *H.*, 15 B. 278; *Bury* v. *Oppenheim*, 26 B. 594; *Turner* v. *Collins*, L. R. 7 Ch. 329, 342; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Savery* v. *King*, 5 H. L. Cas. 627. Cf. *Re Coomber*, [1911] 1 Ch. 174; *ibid.* 723, 727.

(*y*) 7 B. 551; see *De Witte* v. *Addison*, 80 L. T. 207; *O'Connor* v. *Foley*, [1905] 1 Ir. R. 1.

child are placed before the emancipation of the child) that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control" (*z*).

If the transaction between parent and child is reasonable, and entered into with good faith, equity will not interfere (*a*). And so where the dealing between them is of the nature of a family arrangement, as when a father prevails upon a son, tenant in tail under a settlement, to take an estate for life only, with remainder to his first and every other son, the transaction will not be set aside upon the suggestion of the father's having an undue influence over him (*b*). So, if a son, tenant in tail, and a father, tenant for life, agree on something for the benefit of the younger children, and afterwards the son complains of paternal authority being exerted, though there might be something of that sort, yet, if the agreement be reasonable, the Court will not as a rule set it aside (*c*).

Husband and Wife.—This is one of the confidential relationships enumerated by Lord Penzance in *Parfitt* v. *Lawless* (*d*); but in *Barron* v. *Willis* (*e*) Cozens-Hardy, J., said: "It is settled by authority which binds me, although text writers seem to have adopted the opposite view, that the relation of husband and wife is not one of those in which the doctrine of *Huguenin* v. *Baseley* applies." And this ruling was adopted by Eve, J., in *Bank of Africa* v. *Cohen* (*f*), and by Jelf, J., and the Court of Appeal in *Howes* v. *Bishop* (*g*).

Guardian and Ward.—"Where," says Lord Hardwicke, "a

(*z*) And see *Grosvenor* v. *Sherratt*, 28 B. 659; *Sharp* v. *Leach*, 10 W. R. 878; *Revett* v. *Harvey*, 1 S. & S. 502; *Dettmar* v. *Metropolitan, etc., Bank*, 1 Hem. & M. 641; *Smith* v. *Kay*, 7 H. L. Cas. 772; *Wright* v. *Vanderplank*, 8 De G. M. & G. 133, 146; *Maitland* v. *Backhouse*, 16 Si. 58; *Potts* v. *Surr*, 34 B. 543; *Savery* v. *King*, 5 H. L. Cas. 627; *Bainbrigge* v. *Browne*, 18 Ch. D. 188; *De Witte* v. *Addison*, 80 L. T. 207; *Re Coomber*, [1911] 1 Ch., at p. 727.

(*a*) *Blackborn* v. *Edgeley*, 1 P. W. 600, 606; cf. *Firmin* v. *Pulham*, 2 De G. & Sm. 99.

(*b*) *Tendrill* v. *Smith*, 2 Atk. 86; *Jenner* v. *J.*, 2 De G. F. & J. 359.

(*c*) *Cory* v. *C.*, 1 Ves. Sen. 19; *Hartopp* v. *H.*, 21 B. 259; see, as to family arrangements, *Stapilton* v. *S.*, and notes, *supra; Meadows* v. *M.*, 16 B. 401; *Baker* v. *Bradley*, 2 Sm. & G. 531; *Jenner* v. *J.*, 2 De G. F. & J. 359; *Hoblyn* v. *H.*, 41 Ch. D. 200.

(*d*) L. R. 2 P. & D. 462.

(*e*) [1899] 2 Ch. 578, 585.

(*f*) [1909] 2 Ch., at p. 135.

(*g*) [1909] 2 K. B. 390; and see *Talbot* v. *Von Boris*, [1911] 1 K. B. 854, 863; *Westen* v. *Fairbridge*, [1923] 1 K. B. 667.

man acts as guardian, or trustee, in the nature of a guardian, for an infant, the Court is extremely watchful to prevent that person's taking any advantage immediately upon his ward or *cestui que trust* coming of age, and at the time of settling accounts or delivering up the trust, because an undue advantage may be taken. It would give an opportunity, either by flattery or force—by good usage unfairly meant, or by bad usage imposed—to take such an advantage. And, therefore, the principle of the Court is of the same nature with relief in this Court, *on the head of public utility*; as in bonds obtained from young heirs, and rewards given to an attorney pending a cause, and marriage brokage bonds. All depends *upon public utility*; and, therefore, the Court will not suffer it, though, perhaps in a particular instance, there may not be *any actual unfairness*. * * * The rule of the Court as to guardians is extremely strict, and in some cases does infer some hardship: as where there has been a great deal of trouble, and the guardian has acted fairly and honestly; and yet he shall have no allowance. But the Court has established that on great utility and on necessity, and on this principle of humanity, that it is a debt of humanity, that one man owes to another, as every man is liable to be in the same circumstances" (*h*). A gift from a ward to a guardian will be the more readily set aside, if, at the time of its being made, the guardianship accounts are not all settled, or the ward's property is retained by his guardian (*i*).

And such transactions will be set aside after a considerable lapse of time, when the donor has not been a free agent. Thus in *Hatch* v. *H.* (*k*) a guardian, who was incumbent of a living, obtained from his ward, soon after she came of age, a conveyance of the advowson of the living expressed to be made in consideration of her great friendship, kindness, and regard for him, the care taken of her by him, etc.; and of 10s. to his brother, who was the attorney who prepared the deed, and one of the attesting witnesses, and who afterwards became her husband. She continued to live with her guardian for about four years afterwards, when

(*h*) *Hylton* v. *H.*, 2 Ves. Sen. 549; see *Maitland* v. *Backhouse*, 16 Si. 58; *Hatch* v. *H.*, 9 V. 292.

(*i*) *Pierse* v. *Waring*, 1 P. W. 121, Cox's note; S. C., cited 2 Ves. Sen. 549; *Hylton* v. *H.*, 2 Ves. Sen. 547. And see *Dawson* v. *Massey*, 1 Ball & B. 219, where a lease granted to a guardian, and *Aylward* v. *Kearney*, 2 Ball & B. 463, where leases granted to a guardian's son were set aside. See and consider *Cray* v. *Mansfield*, 1 Ves. Sen. 379; *Wood* v. *Downes*, 18 V. 127; *Wright* v. *Proud*, 13 V. 136; *Thornber* v. *Sheard*, 12 B. 589.

(*k*) 9 V. 292; 7 R. R. 195.

she married her guardian's brother; and sixteen years after her marriage, upon the death of her guardian, she and her husband filed a bill to be relieved against the conveyance. Eldon, C., considering that she had never been her own mistress, being with her guardian till her marriage, and with her husband since, notwithstanding the time which had elapsed, and taking into consideration the nature of the property, ordered the instrument to be delivered up to be cancelled; but as the husband was *particeps criminis*, the order was made without costs.

In *The Duke of Hamilton* v. *Mohun* (*l*) the duke being about to marry, entered with great deliberation into marriage articles, one of which was, that he should, within two days after the marriage, release his intended wife's mother, who was her guardian, of all accounts of the mesne profits of the estate. Cowper, C., admitting that there had been no surprise, held, that the covenant to make such release ought to be set aside, as it seemed to be extorted from the duke by one who had a power over the young lady as a parent, which ought not to have been made use of in that manner; that it was as if the mother should say, "You shall not have my daughter unless you will release all accounts"; and that, to tolerate such an agreement would be paving a way to guardians to sell infants under their wardship; and the greater the fortune was, the greater would be the temptation to treat in this manner with the guardian.

So a voluntary settlement made by a female ward soon after she came of age, under the influence of her guardian, and without the advice of an independent solicitor, and the effect of which was to deprive her of the control over her own property, was set aside as improvident, especially as no power of revocation (*m*) was reserved (*n*). The principle applies also to any person assuming the office and functions of a guardian although not legally so constituted (*o*).

Where, however, the influence, as well as the legal authority of the guardian over the ward, has completely ceased, and the ward has been put into possession of his property, after a full and fair settlement of accounts, equity will not interfere to set aside a

(*l*) 1 P. W. 118.

(*m*) See *Wollaston* v. *Tribe*, 9 Eq. 44; *Phillips* v. *Mullings*, L. R. 7 Ch., at p. 247; *James* v. *Couchman*, 29 Ch. D., at p. 217; *Tucker* v. *Bennett*, 38 Ch. D., at p. 14.

(*n*) *Everitt* v. *E.*, 10 Eq. 405.

(*o*) *Griffin* v. *De Veulle*, 3 P. W. 131; *Hylton* v. *H.*, 2 Ves. Sen. 547.

reasonable gift to the guardian. See *Hylton* v. *H.* (*p*). In *Hatch* v. *H.* (*q*), Lord Eldon says, "There may not be a more moral act, one that would do more credit to a young man beginning the world, or afford a better omen for the future, than if, a trustee having done his duty, the *cestui que trust*, taking it into his fair, serious, and well-informed consideration, were to do an act of bounty like this. But the Court cannot permit it, except quite satisfied that the act is of that nature, for the reason often given."

Trustee and Cestui que trust.—Much the same principles apply as in the above-mentioned relations of parent and child, and guardian and ward (*r*). A trustee, moreover, cannot bargain with his *cestui que trust* for a benefit, and in general, a gift by a *cestui que trust* to the trustee is voidable (*s*).

Legal Adviser and Client.—Courts of equity have always acted strictly up to this rule, that a solicitor can, by act *inter vivos*, take nothing for his own benefit from his client pending a suit, save his demand, or indeed *at any time while the connection between them subsists*, with the influence attending it: for though the transaction be as righteous as ever was carried on, it is the settled law, that the connection must, as in the case of guardian and ward, be *bona fide* dissolved, before he can take anything beyond his regular fees (*t*). "All transactions between solicitor and client which result in the solicitor's obtaining a benefit for himself are subjected by Courts of law to strict scrutiny when called in question by the client and are treated as imposing obligations on the solicitor of greater or less stringency. In some cases the obligation goes so far as almost to bind the solicitor to abstain altogether from a transaction of the kind. Thus a solicitor may not accept from his client, while the relation of solicitor and client exists, remuneration for his professional services beyond that to which he is legally

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(*p*) 2 Ves. Sen. 549.

(*q*) 9 V. 296.

(*r*) See *Hatch* v. *H.*, 9 V. 292; *Ellis* v. *Barker*, L. R. 7 Ch. 104; *Tate* v. *Williamson*, 1 Eq., at pp. 536, 537.

(*s*) *Vaughton* v. *Noble*, 30 B., at p. 39; Underhill on Trusts (8th ed.), p. 98.

(*t*) *Proof* v. *Hines*, Cas. t. Talbot, 116; *Gibson* v. *Jeyes*, 6 V. 266; *Walmesley* v. *Booth*, 2 Atk. 25; *Oldham* v. *Hand*, 2 Ves. Sen. 259; *Welles* v. *Middleton*, 1 Cox, 112; 4 Bro. P. C. 245; *Newman* v. *Payne*, 2 V. 199; *Hatch* v. *H.*, 9 V. 296; *Wood* v. *Downes*, 18 V. 120; *Moore* v. *Prance*, 9 Ha. 299; *Holman* v. *Loynes*, 4 De G. M. & G. 270; *Re Ingle*, 21 B. 275; *Walker* v. *Smith*, 29 B. 394; *Re Holme's Estate*, 3 Gif. 337; *O'Brien* v. *Lewis*, 4 Gif. 221; *Tomson* v. *Judge*, 3 Drew. 306; *Gardener* v. *Ennor*, 35 B. 549; *Morgan* v. *Minett*, 6 Ch. D. 638; *Tyars* v. *Alsop*, 59 L. T. 369; *Re Rogerstone Brick and Stone Co., Ltd.*, [1919] 1 Ch. 110.

entitled. Of the application of this rule *O'Brien* v. *Lewis* (*u*) is a striking example. In the great majority of cases, however, the law does not exact so much. A solicitor may, for example, purchase from his client, but there is imposed on him the burden of proving that his client was fully informed, and duly and honestly advised, and that the price was just" (*x*). In *Liles* v. *Terry* (*y*) the plaintiff made a voluntary conveyance of leasehold premises to the defendant, John F. Terry, upon trust for herself for life and after her death upon trust for her niece, the wife of the defendant Terry, for her separate use absolutely. The plaintiff was a spinster of seventy-seven years of age. The defendant, J. F. Terry, had acted as her solicitor in respect of certain litigation about the property conveyed, and the plaintiff had promised that if he would so act without charge she would leave his wife the property. On an action to set aside the deed, Charles, J., held there was nothing to show undue influence or unprofessional conduct; that the plaintiff had had the matter fully explained to her; and that the deed carried out her intention; and gave judgment for defendants. The C. A. reversed the judgment, holding that as the confidential relation existed, it was impossible to rebut the presumption of undue influence, unless the donor had competent and independent advice; and that a gift to the wife stood on the same footing as a gift to the solicitor himself. And a solicitor, having the conduct of a suit, may not purchase the subject-matter of it (*z*).

Where, however, there was no cause pending, and it was proved that there was no undue influence exercised by the attorney, a gift to him has been held valid (*a*). But the presumption of undue influence arising from the relation is not sufficiently rebutted by the mere fact of the client having employed a separate and independent solicitor—even though without any fraud or collusion on the part of the two solicitors—to advise him in the matter of the gift; for the presumption will continue so long as the relation of solicitor and client continues for other purposes outside the gift, or at all

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(*u*) 32 L. J. Ch. 569; 4 Gif. 221.

(*x*) Stirling, L.J., in *Re Haslam and Hier Evans*, [1902] 1 Ch. 765, 769; *Wright* v. *Carter*, [1903] 1 Ch. 27. But see *Allison* v. *Clayhills*, 97 L. T. 709.

(*y*) [1895] 2 Q. B. 679; *Willis* v. *Barron*, [1902] A. C. 271.

(*z*) *Simpson* v. *Lamb*, 26 L. J. Q. B. 121; *Davis* v. *Freethy*, 24 Q. B. D., at p. 523; and see *Luddy's Trustee* v. *Peard*, 33 Ch. D. 500; and *James* v. *Kerr*, 40 Ch. D. 449.

(*a*) *Oldham* v. *Hand*, 2 Ves. Sen. 259; and see *Harris* v. *Tremenheere*, 15 V. 34; cf. *Re Coomber*, [1911] 1 Ch. 723, 727.

events until it can be clearly inferred that the influence arising from the relation no longer exists (*b*).

There is no objection to a sale by a client to his solicitor, provided the solicitor can prove (1) that the client was fully informed; (2) that he had competent independent advice; and (3) that the price given was a fair one (*c*).

A voluntary conveyance to counsel by the client, expressed to be in consideration of the (past) services of counsel, will be set aside on the ground of public policy (*d*).

Whenever a professional man is called upon to give his services to his client, whether to prepare a deed or will, the law imputes to him a knowledge of all the legal consequences to result therefrom, and requires that he should distinctly and clearly point out to his client all those consequences from whence a benefit may arise to himself from the instrument so prepared; and if he fail to do so, a Court of equity will deprive him of it. In *Segrave* v. *Kirwan* (*e*) a barrister drew a will for a friend, and was made executor, in which character he became entitled to the personal estate; he was held, however, by Hart, C., to be a trustee for the next-of-kin (*f*).

And it has moreover been expressly decided, that the relation of counsel and client renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation (*g*). But agreements between a solicitor and his client for the remuneration of the former are now valid, subject to the conditions imposed by the under-mentioned Acts (*h*).

Religious Influence.—" The equitable doctrine of undue influence

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(*b*) *Holman* v. *Loynes*, 4 De G. M. & G. 270; *Wright* v. *Carter*, [1903] 1 Ch. 27; *Demarara Bauxite Co.* v. *Hubbard*, [1923] A. C. 673.

(*c*) *Wright* v. *Carter*, [1903] 1 Ch. 27; *Re Haslam and Hier Evans*, [1902] 1 Ch. 765; *Re Coomber*, [1911] 1 Ch., at p. 727.

(*d*) *Broun* v. *Kennedy*, 33 B. 133; 4 De G. J. & S. 217.

(*e*) Beat. 157.

(*f*) See also *Bulkley* v. *Wilford*, 2 Cl. & Fin. 102; *Corley* v. *Stafford*, 1 De G. & J. 238; *Ex p. Collins*, 2 Ir. Ch. R. 618; *Clark v. Girdwood*, 7 Ch. D. 9; *Cockburn* v. *Edwards*, 18 Ch. D. 449, 455; *Pooley's Trustees* v. *Whetham*, 33 Ch. D. 111.

(*g*) *Kennedy* v. *Broun*, 13 C. B. (N.S.) 677; *Robertson* v. *Macdonough*, 6 L. R. Ir. 433.

(*h*) The Attorney and Solicitors Act, 1870, s. 4; *Pontifex* v. *Farnham*, 41 W. R. 238; *Re Stuart*, [1893] 2 Q. B. 201; *Re Thomas*, [1893] 1 Q. B. 670; *Re Thompson*, [1894] 1 Q. B. 462; *Re Van Laun*, [1907] 1 K. B. 155; [1907] 2 K. B. 23; and see as to Court having jurisdiction to set aside agreement, *Re Jones*, [1895] 2 Ch. 719; [1896] 1 Ch. 222. The Solicitors' Remuneration Act, 1881, s. 8; *Re Palmer*, 45 Ch. D. 291; *Re Frape*, [1893] 2 Ch. 284; *Re Baylis*, [1896] 2 Ch. 107. See also *Cheese* v. *Keen*, [1908] 1 Ch. 245; *Ray* v. *Newton*, [1913] 1 K. B. 249; *Re Foster*, [1920] 3 K. B. 306.

(in gifts 'inter vivos') has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud" (*i*). "The influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of equity have gone very far" (*k*). "Equity will not allow a person who exercises or enjoys a dominant religious influence over another to benefit directly or indirectly by the gifts which the donor makes under, or in consequence of, such influence unless it is shown that the donor, at the time of making the gift, was allowed full and free opportunity for counsel and advice outside—the means of considering his worldly position and exercising an independent will about it. This is not a limitation placed upon the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play" (*l*). In *Allcard* v. *Skinner* (*m*) plaintiff A., being about thirty-five years of age, was introduced in 1868 by her spiritual adviser N. to the defendant S., who was the superior of a sisterhood of which N. was the spiritual adviser and confessor. In 1870 A. became entitled to certain property both as tenant for life and absolutely; she became a postulant in the same year, and made a will leaving all her property to the defendant S. She then became a novice, and in 1871 she became a professed member of this society, and took the vows of poverty, chastity, and obedience. During the period in which she was a professed member of the society, from August, 1871, to May, 1879, she made over to defendant S. sums amounting to upwards of £5,000, all of which, except about £1,000, were spent for the purposes of the society. The sum of £1,000 remained in the hands of S. In May, 1879, she left the society and immediately revoked her will, but made no claim for the return of her property until March, 1885, and did not issue the writ in the action until August, 1885.

The C. A. (Lindley and Bowen, L.JJ., Cotton, L.J., *dissentiente*), held, affirming the decision of Kekewich, J., that under the circumstances the plaintiff had, by her conduct *after she was free from all influence* from N. or S., *confirmed* the gifts, and was

(*i*) *Per* Lindley, L.J., *Allcard* v. *Skinner*, 36 Ch. D., at p. 183. As to gifts by will, see *infra*, p. 245.

(*k*) 36 Ch. D., at p. 183.

(*l*) *Per* Bowen, L.J., 36 Ch. D., at p. 190.

(*m*) 36 Ch. D. 145.

barred therefore from obtaining the relief to which she would otherwise have been entitled. The C. A. found as a fact, that no pressure, except the inevitable pressure of the vows and rules, was brought to bear on the plaintiff; that no deception was practised upon her; that no unfair advantage was taken of her; that none of her money was obtained or applied for the private advantage of N. or S., or for any purpose other than the legitimate purposes of the sisterhood (*n*); nor was there any actual exercise of power or influence over her in respect of these gifts, either by N. or by S., apart from that necessarily incidental to their position in the sisterhood (*o*). Everything done by the plaintiff was in the opinion of the Court referable to her own willing submission to the vows she took, and to the rules which she approved. Nevertheless the Court held that these gifts were in fact made under a pressure which whilst it lasted she could not resist, and were therefore not past recall when that pressure was removed. If in 1879, when she was emancipated from the spell by which she was bound, she had invoked the aid of the Court to recover the money in the hands of S., she would have been entitled to its aid (*p*). There was no proof in this case that the plaintiff, at the time these gifts were made, had an opportunity of obtaining free and independent advice, and knew that she might have obtained such advice if she wished for it, and there was a rule against consulting externs which pointed the other way; and even if such proof had been given, Lindley, L.J., doubted if the gifts could have been supported without further proof that she was free to act on the advice which might be given to her (*q*).

In *Morley* v. *Loughnan* (*r*), the defendant L., a man of no means, was a member of a religious sect known as the Plymouth Brotherhood. This sect was divided into two orders, open brethren and exclusive brethren, and L. belonged to the exclusive order. In 1881 L. was employed as travelling companion to M., a person of large fortune, subject to epileptic fits, never physically or mentally strong, morbidly religious and easily influenced, but still not incapable of managing his own affairs. M. was at this time about thirty years old, was a member of the open order of Plymouth Brethren, and resided on his own estate. In 1883 he invited himself to stay with

(*n*) See judgment of Lindley, L.J., *Allcard* v. *Skinner*, 36 Ch. D., at p. 179.
(*o*) *Ibid.*, at p. 183.
(*p*) *Ibid.* See pp. 186 and 191.
(*q*) *Ibid.*, at p. 184.
(*r*) [1893] 1 Ch. 736.

Huguenin v. Baseley.

L., and from that time until his death in 1891, he continued, except for short intervals, so to reside, giving up his own home. During this period he became converted by L. to his own order of exclusive brethren; he was in a low and morbid condition, he made large payments to L., not requiring any accounts to be furnished to him; he placed his banking account at L.'s disposal, and he made a series of wills in L.'s favour, and the aggregate amount obtained by L. from M. was £140,000. In 1891 M. died by his own hand, bequeathing the remainder of his property to his brothers and sisters. In the same year the executors of his will commenced this action against L. to recover the £140,000 as having been obtained by undue influence. L. had given certain sums, part of this money, to his brothers and brother-in-law, and these persons were subsequently made defendants for the purpose of making them liable to the extent of the gifts received by them. The Court (Wright, J.) held that the money was obtained by the exercise and abuse of personal influence and ascendency established and maintained for that very purpose under a cover of religion and religious brotherhood, that the gifts were not the result of M.'s own free will, but the effect of that influence and domination. Further, that the case came also within the rule laid down by Bowen, L.J., in *Allcard* v. *Skinner* (*s*) as to fiduciary relationship, and that as to £50,000, part of the £140,000, which the Court held was given for furthering certain religious works, L. was liable on another ground, for as he had received it for a definite purpose, he could not repudiate that purpose and claim to keep it for his private and selfish ends. The Court also held that the claim must succeed against the other defendants, citing with approval the judgment of Eldon, C., in the principal case.

In *Norton* v. *Relly* (*t*) a grant of an annuity obtained by a dissenting minister having a spiritual ascendency over a woman under a state of religious delusion, was set aside upon principles of public policy (*u*).

In *Huguenin* v. *Baseley* the donation was set aside, it seems, not merely on the ground of the spiritual ascendency and undue influence obtained by the defendant over the mind of the plaintiff,

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(*s*) 36 Ch. D. 145.

(*t*) 2 Eden, 286.

(*u*) See also *Nottidge* v. *Prince*, 2 Gif. 246; and cf. *Kirwan* v. *Cullen*, 4 Ir. Ch. R. 322; *Maccabe* v. *Hussey*, 2 Dow. & Cl. 440. See as to gifts from nuns to their convents, *Whyte* v. *Meade*, 2 Ir. Eq. R. 420; *Fulham* v. *Macarthy*, 1 H. L. Cas. 703; or to trustees for religious purposes, *Re Metcalfe's Trusts*, 2 De G. J. & S. 122, as to which, see article in 10 Jur. (N.S.), at p. 91.

Mrs. Huguenin, but also on the ground of his having abused the confidence placed in him by her, as an agent managing her affairs (*x*).

In *Lyon* v. *Home* (*y*) Mrs. Lyon, a widow, aged seventy-five, within a few days after seeing one Home, who claimed to be a spiritualist medium, was induced, from the belief that she was fulfilling the wishes (conveyed to her through Home) of her deceased husband, to adopt Home as her son, to transfer £24,000 to him; to make her will in his favour; afterwards to give him a further sum of £6,000; and also to settle upon him, subject to her life interest, the reversion of £30,000. These gifts were made without consideration, and without power of revocation. It was held by Giffard, V.-C., that the relation proved to have existed between them implied the exercise of dominion and influence by Home over Mrs. Lyon, and, consequently, that as Home had failed to prove that these gifts were the pure, voluntary well-understood acts of Mrs. Lyon's mind, they must be set aside (*z*).

Medical Attendant.—In *Dent* v. *Bennett* (*a*) a gift obtained by a medical attendant from his patient was set aside by Lord Cottenham, who held that medical attendants were undoubtedly within that class of persons whose acts, when dealing with their patients, ought to be watched with great jealousy, but he declined to "run the risk of in any degree fettering the exercise of the beneficial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most freely used."

In *Mitchell* v. *Homfray* (*b*) the executors of Mrs. G., a widow, sought to recover a sum of £800 from the defendant, who had acted as her medical attendant. In 1871, Mrs. G. was living at Gainford, and gave the defendant, her medical attendant, two cheques for £500 and £300, to buy a house. Defendant alleged the gift was made in pursuance of the wish of Mrs. G.'s husband, and that he the defendant had agreed to pay and had paid Mrs. G. an annuity of £40 for her life. In 1882 Mrs. G. went to live elsewhere and the relation ceased, but she survived for three years. The case was tried before a jury, and on a new trial before a special jury they

(*x*) See *Middleton* v. *Sherburne*, 4 Y. & C. Ex. 390, 391; *Moxon* v. *Payne*, L. R. 8 Ch. 881, 887.

(*y*) 6 Eq. 655.

(*z*) See also *Gibson* v. *Russell*, 2 Y. & C. C. C. 104; *Fowler* v. *Wyatt*, 24 B. 232, 237.

(*a*) 4 My. & C. 269.

(*b*) 8 Q. B. D. 587.

found that the advance of the £800 was a gift; that there was no undue influence; that the relation of patient and medical adviser came to an end a year after the gift; that *after such determination of the relationship, and after any effect produced by it had been removed, Mrs. G. had confirmed the gift.* It was admitted that Mrs. G. had not received any independent advice when the gift was made, and that the defendant was at that time her medical adviser. The Court entered judgment for defendant, and the Court of Appeal upheld the judgment (*c*).

Other Instances of Special Relationship.—The influence of a man over a woman to whom he is engaged to be married is presumed to be so great, that the Court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used (*d*).

In *Harvey* v. *Mount* (*e*), a voluntary settlement by a younger sister of the whole of her present and future property principally in favour of her eldest sister, was set aside upon the same principle as the transaction in the principal case, *viz.*, that the eldest sister had obtained great ascendency and influence over the younger sister, and was allowed to assume the management of *all* her affairs; the circumstances of the transaction moreover being open to suspicion, the settlement being very improvident, and the younger sister not having had the benefit of independent professional advice (*f*).

In *Rhodes* v. *Bate* (*g*) a person who acted as agent was held to occupy such a confidential relationship. As to the position in this respect of the promoter of a company, see *Erlanger* v. *New Sombrero, etc. Co.* (*h*).

In *Wheeler* v. *Sargeant* (*i*) an executor before probate obtained a gift from a beneficiary. The plaintiff had no competent or

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(*c*) Cf. *Pratt* v. *Barker*, 4 Russ. 507; *Wright* v. *Proud*, 13 V. 136; *Tyars* v. *Alsop*, 59 L. T. 369.

(*d*) *Page* v. *Horne*, 11 B. 227, 235, 236; *Cobbett* v. *Brock*, 20 B. 524; *Lovesy* v. *Smith*, 15 Ch. D. 655; *James* v. *Holmes*, 31 L. J. Ch. 567.

(*e*) 8 B. 439.

(*f*) And see *Osmond* v. *Fitzroy*, 3 P. W. 129, and note; *Bridgman* v. *Green*, 2 Ves. Sen. 627; Wilm. 58; *Sharp* v. *Leach*, 31 B. 491.

(*g*) L. R. 1 Ch. 252.

(*h*) 3 A. C., at p. 1230; Pollock, Contracts, 9th ed., 651; and cf. *per* Lord Herschell, *Bentinck* v. *Fenn*, 12 A. C., at p. 656.

(*i*) 3 R. 663.

independent advice, and the Court held that his position alone as executor without any words of pressure yet amounted in fact to pressure, and ordered restitution of the gift.

It is not every fiduciary relation which will induce a Court of equity to set aside a gift, but only those special relations which from their nature raise a presumption of undue influence (*k*).

3. Where there is no Special Confidential Relationship between Donor and Donee.

In cases where the intimate relations before-mentioned do not exist between the donor and donee, fraud or undue influence *must be proved* against the donee in order that the gift may be set aside (*l*). And in such cases the age or capacity of the donor and the nature of the benefit are material (*m*).

Where a man induces a person of weak intellect and improvident habits to execute a settlement without independent legal advice and without understanding it, or knowing the amount of the property settled, or the effect of the settlement, it will be set aside, even although the execution of the settlement was not procured by any unworthy motives, but with the object of protecting the settlor against his own improvidence (*n*).

One party may acquire undue influence over another by operating on his fears, as for instance in *Williams* v. *Bayley* (*o*), in which case a son had taken to his and his father's bankers promissory notes purporting to be indorsed by his father. The son had forged the indorsements. The bankers at an interview which took place between them, the son, the father and the father's solicitor, said in effect to the father: "We have the means of prosecuting and transporting your son. Do you choose to come to his help and take on yourself the amount of his debts—the amount of these forgeries? If you do, we will not prosecute; if

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(*k*) *Re Coomber*, [1911] 1 Ch. 723.

(*l*) See *Hunter* v. *Atkins*, 3 My. & K. 113; *Beanland* v. *Bradley*, 2 Sm. & G. 339; *Blackie* v. *Clark*, 15 B. 595; *Toker* v. *T.*, 31 B. 629; *Smith* v. *Kay*, 7 H. L. Cas. 750; *Allcard* v. *Skinner*, 36 Ch. D., at p. 171; and see Pollock, Contracts (9th ed.), 653; *Phillips* v. *Mullings*, L. R. 7 Ch. 244; *Rees* v. *De Bernardy*, 12 T. L. R. 412; *Turnbull* v. *Duval*, [1902] A. C. 429.

(*m*) *Rhodes* v. *Bate*, L. R. 1 Ch. 252; and see *Re Coomber*, [1911] 1 Ch. 174, 723.

(*n*) *Dutton* v. *Thompson*, 23 Ch. D. 278; *Smith* v. *Kay*, 7 H. L. Cas. 750; cf. *Chesterfield* v. *Janssen*, *infra*; *Ellis* v. *Barker*, L. R. 7 Ch. 104; *Grosvenor* v *Sherratt*, 28 B. 659.

(*o*) L. R. 1 H. L. 200; and see *Kaufman* v. *Gerson*, [1904] 1 K. B. 591.

you do not, we will." The father thereupon executed an agreement to mortgage his property to the bankers, and the forged notes were given up to him. Two questions arose in the action brought by the father to set aside this agreement: was the plaintiff a free and voluntary agent, or did he give the security in question under undue pressure exerted by the defendants? Was the transaction independently of pressure illegal? As to the first point Lord Westbury said: "A contract to give security for the debt of another which is a contract without consideration, is above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it. But it is clear that the power of considering whether he ought to do it or not, whether it is prudent to do it or not, is altogether taken away from a father who is brought into the situation of either refusing, and leaving his son in that perilous position, or of taking on himself the amount of that civil obligation." And the decree setting aside the security was upheld on both grounds (*p*).

An appointment made in exercise of a power by a wife in favour of her husband will be considered good, unless the wife or other persons impeaching the instrument show that it was executed under circumstances sufficient to invalidate it, and the evidence of one of the witnesses that the wife was agitated and distressed and signed the deed in a reluctant manner, has been held to be insufficient (*q*).

In the absence of any fiduciary relationship, such as that of guardian and ward, between the donor and donee, and also of any undue influence on the part of the latter, an infant may make a donation of any chattels or personal property in his actual possession (*r*).

The principle on which relief is given applies to all cases where influence is acquired and abused, and confidence reposed and betrayed (*s*).

Inadequate Consideration.—Mere inadequacy of consideration is by itself only evidence of fraud or undue influence, but when

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(*p*) See *Davies* v. *London, etc., Marine Insurance Co.*, 8 Ch. D., at p. 475; *Boyse* v. *Rossborough*, 6 H. L. Cas. 2; *Lound* v. *Grimwade*, 39 Ch. D. 605; *L. G. O. Co.* v. *Holloway*, [1912] 2 K. B. 72.

(*q*) *Nedby* v. *N.*, 5 De G. & Sm. 377, 384; see *Barron* v. *Willis*, [1899] 2 Ch. 578, 585; *Howes* v. *Bishop*, [1909] 2 K. B. 390; *Westen* v. *Fairbridge*, [1923] 1 K. B. 667.

(*r*) *Taylor* v. *Johnston*, 19 Ch. D. 603, 608.

(*s*) *Smith* v. *Kay*, 7 H. L. Cas. 750.

coupled with other circumstances, such as weakness of mind (*t*), illness and ignorance (*u*), poverty (*x*), may have the effect of showing that the vendor was not a free and reasonable agent, and may throw the burden on the purchaser of showing that the contract was fair (*y*).

4. How far the Court will Interfere as against Third Parties.

An interest obtained by undue influence, as Lord Eldon decided in the principal case, cannot be held by third parties, although innocent of fraud. "Whoever receives the gift, must take it tainted and infected with the undue influence and imposition of the person procuring the gift; his partitioning and cantoning it out amongst his relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, if it comes through a polluted channel, the obligation of restitution will follow it" (*z*).

Where persons, having notice of the undue influence which one party has power to exercise over another, combine with the former party in order to obtain an advantage for themselves, the transaction will be set aside. Thus, where a creditor obtains a security from a person likely to be under the influence of his debtor, as, for instance, in the case of a son or younger brother of the debtor just come of age, the onus will lie upon the creditor of showing that such person understood the transaction, and that he did not act under any undue influence, otherwise the transaction will be set aside (*a*).

So in *Maitland* v. *Irving* (*b*), Irving and Brown, who were partners as coal-merchants, consented to postpone the payment of

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(*t*) *Longmate* v. *Ledger*, 2 Giff. 157.

(*u*) *Clark* v. *Malpas*, 31 B. 80; *Baker* v. *Monk*, 33 B. 419; cf. *Rees* v. *De Bernardy*, 12 T. L. R. 412.

(*x*) *Fry* v. *Lane*, 40 Ch. D. 312.

(*y*) See Pollock, Contracts (9th ed.), 666; and as to catching bargains with heirs, see *Chesterfield* v. *Janssen*, *post*, and notes.

(*z*) *Per* Wilmot, C.J., in *Bridgman* v. *Green*, Wilm. 58, 64. And see *Goddard* v. *Carlisle*, 9 Price, 169; *Scholefield* v. *Templer*, John. 155; *Smith* v. *Kay*, 7 H. L. C. 750; *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 197; *Morley* v. *Loughnan*, [1893] 1 Ch. 736, 757.

(*a*) *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Sercombe* v. *Sanders*, 34 B. 382; *Berdoe* v. *Dawson*, 34 B. 603; cf. *Rhodes* v. *Bate*, L. R. 1 Ch. 252; *Turnbull* v. *Duval*, [1902] A. C. 429; *Bischoff's Trustee* v. *Frank*, 89 L. T. 188; *Chaplin* v. *Brammall*, [1908] 1 K. B. 233; and see *De Lisle* v. *Union Bank of Scotland*, [1914] 1 Ch. 22, 31.

(*b*) 15 Si. 437.

£5,000 due to them from Maclean, in consideration of his procuring and giving the guarantee of the plaintiff, Miss Maitland, for that sum; and Maclean at the same time informed Irving and Brown that Miss Maitland was his niece, and was possessed of considerable property; that she had resided with him for some time, that he had been her guardian, and that she had been of age about a year and a half. Afterwards, another arrangement was made between Irving and Brown and Maclean, in pursuance of which Irving and Brown delivered up the guarantee, and Maclean procured and gave them the plaintiff's cheque for £3,000 and her promissory note for £1,200, as securities for his paying them those sums. Shadwell, V.-C., granted and afterwards continued an injunction, restraining Irving and Brown from prosecuting an action against the plaintiff to recover the £3,000; and notwithstanding they had obtained a verdict, he refused to order the money to be paid into Court. "The case," said his Honor, "has been argued for the defendants as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person, who, if he had performed his duty, would have advised her not to do that which he applied to her to do. She was influenced by him, or, at least, allowed by him, to give this very guarantee, which was a direct benefit to all the defenders in the situation in which they then stood with respect to each other. The facts of the case seem to me to amount to this: that Irving and Brown, knowing the defenceless situation of the young lady, combined with Maclean, who disclosed it to them, in order that advantage might be taken of her defenceless situation, for the benefit of all the three. And my opinion is, that they must all three be considered as standing in the same situation. It is most necessary to consider the transaction in this view, because it is the foundation of the whole case; for, what subsequently took place was nothing more than a substitution of the note and the cheque for the guarantee" (*c*).

The principles, however, laid down in the cases before mentioned are not applicable to *bona fide* business transactions.

(*c*) And see *Maitland* v. *Backhouse*, 16 Si. 58; *Archer* v. *Hudson*, 7 B. 551; *Espey* v. *Lake*, 10 Ha. 261; *Dettmar* v. *Metropolitan and Provincial Bank, Ltd.*, 1 Hem. & M. 641; *Rhodes* v. *Bate*, L. R. 1 Ch. 252; W. *v.* B., 32 B. 574; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15.

Thus in *Blackie* v. *Clark* (*d*), a married woman having separate estate, joined with her trustee, who was her confidential medical adviser, in granting annuities secured on her separate estate for his benefit. Upon her filing a bill to set them aside as against the grantees, it was held by Romilly, M.R., that the burden of proving their invalidity was on her, and as it appeared that she understood the transaction, and that no undue persuasion or coercion had been proved, the annuities could not be impeached.

In *Corbett* v. *Brock* (*e*), a debtor induced a lady, to whom he was engaged to be married, to become a security for a debt. After the marriage she insisted that she had been imposed upon. It was held by Romilly, M.R., that the only duty of a creditor (who was aware of the relation between the parties) towards the lady was to see that she had proper professional assistance, and that any fraud or misrepresentation of the debtor in the transaction, of which the creditor had no notice did not affect his security. "The fact of the intended husband saying, 'I am about to marry a lady who will give you security,' does not amount to notice to them that this security could only be obtained by undue influence" (*f*).

Where, however, a gift of property has been obtained by the exercise of undue influence, a purchaser for value who subsequently takes with notice of the equity thereby created, or with notice of the circumstances from which the Court confers the equity, will be bound thereby (*g*).

And it seems that although a deed may be valid in respect to purchasers without notice of undue influence, as for instance, that of the father over his child as plaintiff in an action, it may at the same time be declared that so far as the father is concerned the deed is not binding in any way on the plaintiff (*h*).

It will be observed that in the principal case, the solicitor who prepared the deeds which were set aside as obtained by undue influence having been made a party to the suit, Lord Eldon observed that it deserved serious consideration "whether he should not pay the costs if the other defendant could not" (*i*).

(*d*) 15 B. 595. (*e*) 20 B. 524.

(*f*) See *Cooke* v. *Lamotte*, 15 B. 234; *Hoghton* v. *H.*, 15 B. 278.

(*g*) *Bainbrigge* v. *Browne*, 18 Ch. D. 197; *De Witte* v. *Addison*, 80 L. T. 207.

(*h*) *Bainbrigge* v. *Browne*, 18 Ch. D. 188, 199; cf. *Wright* v. *Carter*, [1903] 1 Ch. 27.

(*i*) See *Baker* v. *Loader*, 16 Eq. 49; *Beadles* v. *Burch*, 10 Si. 332; *Harvey* v. *Mount*, 8 B. 439; but see *Clark* v. *Girdwood*, 7 Ch. D. 9.

5. Delay, Acquiescence, Confirmation.

Delay in asserting rights cannot be in equity a defence unless the plaintiff knows his rights (*k*). In *Allcard* v. *Skinner* (*l*), more than six years had elapsed since the influence had ceased, and the action was commenced, and following the analogy of the Statute of Limitations in actions for money had and received, such delay would be a very material element for consideration (*m*). And although delay is not a bar in itself, it is a fact to be considered in determining whether there has been an election on the part of the donor to confirm the gift (*n*).

In cases of this kind there can be no acquiescence until the donor knows his rights and is free from the influence, but ignorance of his rights which is the result of deliberate choice is no answer to a defence of laches and acquiescence. It is enough for the donee to show that the donor knew he might have rights, and being a free agent at the time, deliberately determined not to inquire what they were or to act upon them (*o*).

6. Gifts by Will.

The rules of equity in relation to gifts *inter vivos*, by which fraud is presumed when they are obtained from persons standing in certain relations to the donors, are not applicable to gifts by will (*p*). "To be undue influence in the eye of the law there must be—to sum it up in one word—coercion. * * * It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do that it is undue

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(*k*) *Per* Cotton, L.J., in *Allcard* v. *Skinner*, 36 Ch. D., at p. 174; *Wright* v. *Vanderplank*, 8 De G. M. & G. 133, where the action to set aside a deed was not brought until ten years after its execution; and see *Bank of Montreal* v. *Stuart*, [1911] A. C. 120.

(*l*) 36 Ch. D. 145, 186.

(*m*) See *Smith* v. *Clay*, 3 Bro. Ch. 639 (n.); *Hovenden* v. *Annesley*, 2 Sch. & L. 607, 630. And see *Tyars* v. *Alsop*, etc., 59 L. T. 369.

(*n*) *Allcard* v. *Skinner*, 36 Ch. D., at pp 191—193.

(*o*) See judgment of Kekewich, J., and of Lindley and Bowen, L.JJ., in *Allcard* v. *Skinner, supra*; and see *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C., at p. 239; *Wright* v. *Vanderplank*, 8 De G. M. & G. 133; *Stump* v. *Gaby*, 2 De G. M. & G. 623; *Jarratt* v. *Aldam*, 9 Eq. 463; *Moxon* v. *Payne*, L. R. 8 Ch. 881; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Mitchell* v. *Homfray*, 8 Q. B. D. 587; *Bank of Montreal* v. *Stuart*, [1911] A. C. 120.

(*p*) See *Parfitt* v. *Lawless*, L. R. 2 P. & D. 462; *Ashwell* v. *Lomi*, L. R. 2 P. & D. 477; *Craig* v. *Lamoureux*, [1920] A. C. 349.

influence " (*q*). But the rule would seem to be wider than this; coercion *or fraud*, must be proved, *e.g.*, misrepresentations as to the character of the natural objects of the testator's bounty (*r*). The influence of a person standing in a fiduciary relation to the testator may lawfully be exerted to obtain a will or legacy, so long as the testator thoroughly understands what he is doing and is *a free agent* (*s*); and the burden of proof of undue influence (*t*) lies upon those who assert it (*u*). But " there is one rule which has always been laid down by the Courts having to deal with wills, and that is that a person, who is *instrumental in the framing of a will*, and who obtains a bounty by that will, is placed in a different position from other ordinary legatees, who are not called upon to substantiate the truth and honesty of the transaction as regards their legacies. It is enough in their case that the will was read over to the testator, and that he was of sound mind and memory, and capable of comprehending it. But there is a farther onus upon those who take for their own benefit, after having been instrumental in preparing *or obtaining* a will. They have thrown upon them the onus of showing the righteousness of the transaction " (*x*).

If proved that the instrument contains something induced by fraud, and therefore not the testator's will, this, if severable from the rest, may be struck out by the Probate Court and the will proved without it (*y*). But words or clauses in a will ought not to be omitted from probate except upon evidence pointedly addressed thereto and showing their improper character (*z*). The

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(*q*) *Per* Sir J. Hannen in *Wingrove* v. *W.*, 11 P. D., at p. 82; *Boudains* v. *Richardson*, [1906] A. C. 169; Williams on Executors (11th ed.), 32.

(*r*) *Boyse* v. *Rossborough*, 6 H. L. C. 48; *Allen* v. *McPherson*, 1 H. L. C. 207; *Hindson* v. *Weatherill*, 5 De G. M. & G. 301; *Craig* v. *Lamoureux*, *supra*.

(*s*) See *Wingrove* v. *W.*, 11 P. D. 81; *Parfitt* v. *Lawless*, L. R. 2 P. & D., at p. 469; *Boudains* v. *Richardson*, [1906] A. C. 169, 185; Kerr on Fraud (5th ed.), 315—317.

(*t*) See *Wingrove* v. *W.*, *supra*.

(*u*) *Boyse* v. *Rossborough*, *supra*; *Craig* v. *Lamoureux*, [1920] A. C. 349; Theobald on Wills (1908), (7th ed.), p. 27; Williams on Executors (11th ed.), 35

(*x*) *Per* Lord Hatherley, *Fulton* v. *Andrews*, L. R. 7 H. L., at pp. 471, 472; cf. *Donelly* v. *Broughton*, [1891] A. C. 435; *Tyrrell* v. *Painton*, [1894] P. 151; *Hegarty* v. *King*, 7 L. R. Ir. 18; Kerr, p. 483. In such a case the person opposing the will is justified in pleading undue influence and fraud, and, though unsuccessful, ought not to be condemned in costs unless the issue was unreasonably raised; *Wilson* v. *Bassil*, [1903] P. 239; Tristram and Coote (16th ed.), 591.

(*y*) *Rhodes* v. *R.*, 7 A. C. 192; *Hindson* v. *Weatherill*, 5 De G. M. & G. 301; *Allen* v. *McPherson*, 1 H. L. C. 209; Williams on Executors, 290.

(*z*) *Karunaratne* v. *Ferdinandus*, [1902] A. C. 405.

jurisdiction rests with the Court of Probate. The Chancery Division will not interfere and declare the legatee a trustee where this would amount to a decision on appeal from the Probate Court (*a*), though it will where the gift is in accordance with the testator's intention, but the legatee is bound by a secret trust (*b*).

(*a*) *Meluish* v. *Milton*, 3 Ch. D. 27.

(*b*) See *Re Boyes*, 26 Ch. D. 531; *Re Huxtable*, [1902] 2 Ch. 793; *Re Hetley*, [1902] 2 Ch. 866; *Re Gardner*, [1920] 2 Ch. 523. Cf. *Allen* v. *McPherson*, 1 H. L. C. 191.

EARL OF CHESTERFIELD *v.* SIR ABRAHAM JANSSEN (*a*).

1750—1. 2 Ves. Sen. 125 (*b*).

Post Obit Securities—Catching Bargains with Heirs Expectant and Reversioners—Confirmation.

A, aged thirty, borrows £5,000 from B, upon the security of a bond in the penalty of £20,000, conditioned for payment of £10,000 if A survived C, his grandmother, from whom he had great expectations, but not otherwise. A survived C a year and eight months, and soon after her death executed a new bond in the penalty of £20,000, conditioned for payment of £10,000 to B, which he gave to B on his delivering up to him the former bond to be cancelled.

A bill being filed by the executors of A to be relieved against the latter bond, as given upon a usurious contract, and an unconscionable bargain, the Court was of opinion that the contract was not usurious, and, without giving any opinion whether the transaction was such as the Court ought to relieve against, as an unconscionable bargain with a person dealing with his expectancy, held, that the acts of A, after the decease of his grandmother, amounted to a confirmation of the original transaction, and gave relief only against the penalty of the last bond.

The state of the case upon the pleadings and proofs, as far as was material for the consideration of the Court, was shortly this. John Spencer, in 1738, being possessed of an income of £7,000 per annum, and of a personal estate in plate, jewels, and furniture, to a great value, and having contracted a debt to the amount of £20,000 to several persons, mostly tradesmen, by whom he was pressed, and which he was desirous to pay off, proposed to borrow money, and particularly a sum of £5,000 for that purpose.

As he had a well-grounded expectation of a great increase of fortune on the death of his grandmother, the Duchess of Marlborough, if he survived her, he resolved to contract thereon.

(*a*) For other cases of constructive fraud, see *Fox* v. *Mackreth*, *post*, Purchase by a trustee; *Aleyn* v. *Belchier*, *post*, Fraud on a power; *Strathmore* v. *Bowes*, *post*, Fraud on marital rights.

(*b*) S. C., 1 Atk. 301; 1 Wils. 286.

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He was above thirty, originally of a hale constitution, but impaired; and, although afterwards he lived more regular, yet he was addicted to several habits prejudicial to his health, which he could not leave off. She was seventy-eight, of a good constitution for her age, and careful of her health.

He sent to market a proposal, which he supposed would easily meet with a purchaser, as it was natural to expect, in common course, that his grandmother should die first, though she was a good old life, and he but a bad young one. This proposal was, that if any one would lend him £5,000 he would oblige himself to pay £10,000 at or soon after the death of his grandmother, if he survived her, but to be totally lost if she survived him. This was rejected by several knowing persons as not sufficiently advantageous, as it was at first by the defendant, but afterwards accepted by him; and a bond of £20,000, conditioned to pay £10,000, was given on those terms.

[(*c*) The Duchess of Marlborough died on October 18, 1744, and in the month of December following, on the defendant's delivering to Mr. Spencer the bond above mentioned to be cancelled, he executed a new bond, whereby he became bound to the defendant in the penalty of £20,000, conditioned for payment to the defendant of £10,000, with lawful interest, on April 19 then next; and at the same time executed a warrant of attorney to empower a judgment to be recorded against him in the King's Bench, at the defendant's suit, for the said £20,000 on the said bond. The defendant, by virtue of the said warrant of attorney, caused a judgment to be made out on the said bond against Mr. Spencer, at the defendant's suit, for the said £20,000, to be recorded in the King's Bench of Hilary Term next ensuing the date of the said bond.

In the month of December, 1745, the defendant, by the invitation of Mr. Spencer, being with him at his house at Windsor, he, on the 14th of that month, gave the defendant a bill for £1,000 on Hoare and Company, in part of the defendant's debt, and on March 21 following sent the defendant £1,000 more by his steward.

(*c*) This statement between brackets is taken from 1 Atk. 301.

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On June 19, 1746, Mr. Spencer died, but before his death made his will, and after payment of his debts and legacies, gave all the residue of his personal estate to be at his son's disposal, the present Mr. Spencer, provided he left no younger child, and appointed the plaintiffs to be guardians of his son, and also executors in trust for him during his minority.

The executors of Mr. Spencer, finding his specialty debts were very considerable, and that such as were upon simple contracts only, which likewise amounted to a very large sum, would receive but little satisfaction through the deficiency of the testator's assets, after payment of such sums as were really and *bona fide* due on specialties, brought a bill to be relieved against the defendant's demand, as being an unconscionable one, charging that the condition stipulated by his security was absolute and independent of any other contingency than that of a grandson of thirty years of age surviving a grandmother of eighty; and as the period or point of time limited for the payment (which was in one month after the death of the duchess) could not, by reason of her great age and infirmities, be removed to any great distance, but was every day approaching, and in fact happened soon after, so the requiring such a large sum as £10,000 for the forbearance of £5,000 for so short a time, being at the proportion of £200 for every £100, was a most unreasonable and usurious contract, and such as will never meet with the approbation or countenance of a Court of equity, especially where the demand is made upon the assets of an insolvent person, to the prejudice and defeating of his other just and honest creditors, and of an infant heir and residuary legatee; and that the executing a new bond to the defendant after the death of the Duchess of Marlborough, is only a continuance of the former transactions, and partook of the original fraud; and that, being an unrighteous and usurious bargain in the beginning, nothing which was done afterwards could help it; but on the contrary, defendant, in acquiring such new security and judgment, and thereby seeking to conceal the true transaction, did, as far as in him lay, add to the first fraud, and ought to be restrained from taking out execution on his judgment till the Court have first inquired into and determined

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upon the fraud; and therefore, it is prayed that the defendant may be adjudged by the Court to be a creditor of Mr. Spencer, only for such sums as he shall appear to have *bona fide* advanced, with interest from the time of advancing the same, after deducting what he hath received; and that he may be decreed to come in, and receive a satisfaction for the residue of such principal sums only, and interest *pari passu* with Mr. Spencer's other creditors, according to the nature of his demand; and for an injunction to stay his proceedings at law till the hearing of the cause.

July 21, 1747, the injunction was continued upon the merits till the hearing.]

Mr. Noel, Mr. Clarke, Mr. Wilbraham, and Mr. Crowle, for the plaintiffs.—This case is of great importance to the estate of Mr. Spencer, but of greater to the public. The bill is to be relieved against an exorbitant, unconscientious demand, on the known terms in a Court of equity, payment of principal really advanced, and legal interest. There are three general points to be determined. First, how that contract would have stood if properly brought in judgment in a Court of law, and considered merely upon legal principles? Next, what the fate of it ought to be in a much stronger degree, in a Court of equity, when examined by principles of equity? Lastly, the subsequent transactions relied upon in the answer as a ratification of the original bargain.

As to the first, it is not good in point of law, and therefore usurious (*d*).

As to the second point: Courts of equity, not being tied up to rules, consider questions of this kind in a more extensive manner, and in general have avoided laying down any particular rule, as that would (like old statutes of usury) teach persons how far they might safely go; but declare, that wherever there is a spark of oppression—the motive on one side, necessity to apply for money, on the other, a covetous passion for undue

(*d*) The laws against usury are now abolished, 17 & 18 Vict. c. 90; 24 & 25 Vict. c. 101, and therefore such parts of the case as relate thereto are omitted.

lucre—they always relieve; not, indeed, setting it aside, but by giving what is really due. The following cases were cited upon this point:—*Waller* v. *Dalt* (*e*), which was introductive of *Barny* v. *Beak* (*f*), *Berny* v. *Pitt* (*g*), *Birney* v. *Tison* (*h*), *Batty* v. *Lloyd* (*i*), *Nott* v. *Hill* (*k*), *Ardglasse* v. *Muschamp* (*l*), *Twistleton* v. *Griffith* (*m*), *Curwyn* v. *Milner* (*n*), *Lawley* v. *Hooper* (*o*). It is on the principle of public utility that Courts of equity have gone further than the law. So, from the general inconvenience, præmiums for places are not allowed, because there the office falls to the man; not that he is fit for it, but the office fit for him. So in *Hall* v. *Potter* (*p*), *Shepley* v. *Woodhouse* (*q*). No proof of fraud or undue advantage is requisite: the case speaks for it, and otherwise it would be saying, the Court will not relieve at all, as to such secret transactions witnesses are not called in. It is unjust and unreasonable, and in that light a Court of equity calls it a fraud, arising from avarice on one side and distress on the other; and will relieve on the same principles as in *Sir Thomas Meere's Case* (*r*); and see *Bosanquet* v. *Dashwood* (*s*), *Twistleton* v. *Griffith* (*t*).

As to the *third* point, all the other acts of Mr. Spencer were, when under the like circumstances, as originally, proceeding from his inability to do more. His acquiescence cannot be considered a ratification, but may be excused by his looking on it as a debt of honour and a sort of wager. The bond and judgment are an evidence he could not pay; he would go as far as possible; no money could be raised but by annual rents, whereas an immediate payment was to be made; and the borrower is a servant to the lender: *Curwyn* v. *Milner* (*u*), *Wiseman* v. *Beake* (*x*), *Ardglasse* v. *Muschamp* (*y*).

Mr. Attorney-General (Sir Dudley Rider), and Mr. Solicitor-General (Mr. Murray), for the defendant.—This is indeed a

(*e*) 1 Ch. Ca. 276.
(*f*) 2 Ch. Ca. 136.
(*g*) 2 Vern. 14.
(*h*) 2 Vent. 359.
(*i*) 1 Vern. 141.
(*k*) 1 Vern. 167, 271.
(*l*) 1 Vern. 237.
(*m*) 1 P. W. 310.
(*n*) 3 P. W. 293 (n.).
(*o*) 3 Atk. 278.
(*p*) Show. P. C. 76; 1 Eq. Ca. Abr. 89.
(*q*) 2 Atk. 535.
(*r*) 1 Vern. 465.
(*s*) Cas. t. Talbot, 40.
(*t*) 1 P. W. 310.
(*u*) 3 P. W. 293 (n.).
(*x*) 2 Vern. 121.
(*y*) 1 Vern. 237.

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matter of importance, being a question whether a man's own act, without fraud, in full senses, and having the absolute disposal, shall bind him. If (as had been argued) there was no other way in which the Court could assist the preservation of families from ruin, it is better the law should be wrong in itself than uncertain. So far as a Court of equity can prevent such destruction by general rules, it will lay down such rules, but will not endeavour to preserve a weak or wicked man; nor say that by the rules of equity an honest and wise man cannot be protected in his honesty and wisdom. The question of law must arise out of the fact; the particular question of equity must depend on the fact also, considered under all its extensive circumstances, taking in the convenience and inconvenience, but still the ground to go upon must be made out by evidence. It will hereby be shown that this is a fair, honest, and honourable contract.

The circumstances come under these heads—first, the character, situation, and figure of life of the obligor; secondly, the same as to the obligee; thirdly, the motive or reasonableness thereof, inducing the obligor to solicit such a bargain; fourthly, the manner of transacting and concluding; fifthly, the fairness and equality of the price, from the chance, under all the circumstances, according to the probability at the time and the event, that has happened; sixthly, the opinion the obligor always had of this.

As to the *first*, it is material in all cases. His understanding is not charged by the bill to be weak, or likely to be imposed on, or that he was imposed on. He was turned of thirty—(in *Wiseman* v. *Beake* (*z*), the plaintiff, an expectant heir, was nearly forty, and a proctor)—no heir of any sort, in which the term is applied in these subjects; for if one, living with his father, is considered as heir (although *nemo est hæres viventis*) he had no father, but was himself father of a family: he was in no state of quarrel with any relations: known never to have gamed, which, it is proved, he hated; and he had given up some former extravagances, and lived more temperately; was his own master; possessed of a fine family seat, with furniture suitable to his

(*z*) 2 Vern. 121.

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rank and figure; of £7,500 per annum for life, besides present personal estate, contingent reversions, and hopes from his grandmother. The pressure on him for his debts of £20,000 (it appears not how contracted) was from tradesmen. Justice obliged him to pay them; it would be scandalous not to do so, and prudence required it, lest it might alter his grandmother's opinion of him. He must have paid this by the annual profits, joint or single annuities for his life, or selling his personal estate, reversion, or the chance he had from his grandmother: and this would have been, probably, the opinion of the best and wisest friend he had. None would advise the selling his personal estate, family pictures, etc., which would be declaring himself bankrupt. The annual profits would not do it, nor would his creditors wait without impatience for it. As to annuities (the way taken by a tenant for life who wants money for particular purposes), it certainly is not a beneficial way of contracting. * * * Then his only chance to raise money was this, and it was the most reasonable way, if fairly done and on reasonable terms; and otherwise his goods might be taken in execution and sold for little value, as generally happens.

Next, for the circumstances of the defendant, who is not charged in respect of his character, behaviour, or manner of dealing. * * * The defendant is not a person looking out for young men to prey upon; he did not think it a beneficial contract, and absolutely refused it; but afterwards accepted it, on particular application and pressing. Mr. Spencer himself, in private, fixed on what he thought the fair price, and does personally, and by agents, propose these terms to any who would buy; which were refused by several, only because not advantageous.

As to the manner, it is proposed, in the first moment, as a conditional bargain. If it turned out against the defendant, there was certainty of a loss: if for him, they might live so long as that there would be a very improbable chance of gain. No undue advantage is taken, for what is proposed is simply accepted.

As to the equality of it as a bargain of chance, whoever deals in or buys lives must have regard particularly to the constitution

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of the person, manner of life, and age. If the life is bad, the company will not insure at all: all circumstances must be considered, and it is enough to go on probable opinion. The bargain supposes an inequality in their lives, that the grandmother was most likely to die first: she was of good health, and took care of it; Mr. Spencer the contrary, from his course of life. * * * The defendant has proved that none would give that, or so much as he did: the plaintiffs have proved nothing of that, which would have been material to show the value of the contract. The disproportion, then, of the risk will not make it a bad contract: nor does this Court consider bargains in the nice scale of exact quality; nor adopt the rule of the Roman law, by which, if a bargain was one-half under value, it was set aside.

Lastly, his subsequent acts—as paying part, writing the letter himself to confess judgment, and taking every step after her death to carry it into execution—would not, perhaps, be of so much weight if they were not consistent with his private opinion: his declarations in private being that he was honourably and fairly dealt by. The judgment was freely given, and not complained of afterwards; so that, if it could have been set aside originally, it cannot now; and, being in his senses, he might have released any demand. A release in terms of all his right to set it aside would have operated in point of law. Then is it not so in equity? A release, indeed, may, like any other contract, be set aside in this Court; but that must be on new imposition in obtaining the judgment. Things did not remain in the same situation, for now the money became absolutely due; nor was he under the same necessity; and might have disputed it then. In *Cole* v. *Gibbons* (*a*) the contract had not a possibility of being fair; yet there was no relief, because it was confirmed with open eyes. In *Standard* v. *Metcalf* (*b*) the plaintiff lived with the defendant, her uncle, and soon after coming of age was prevailed on by him to settle her estate upon herself for life, remainder to her issue in tail, remainder to her uncle and his heirs; she afterwards became a lunatic. The transaction was thought on the face of it to be hard, and an imposition by the

(*a*) 3 P. W. 290.

(*b*) November, 1734; see 3 Atk. p. 301.

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uncle, acting as guardian, there being no consideration, nor any occasion for it, not being for marriage: on a bill to set it aside, the defendant insisted it was fair, and that, after the settlement, she by will, to which he was not privy, had given the estate in the same way. Lord Talbot thought it an extraordinary contract, and unfair, though no proof of fraud, and said if it depended on the settlement only, he should have relieved; but the will had confirmed it, which took off that ground to set it aside: on appeal it was affirmed, with this variation only, that as the bill was by the committee it ought not to bind the lunatic, but should be without prejudice to her, if she should become sane, and seek to set it aside. The will did not operate there, but only showed a confirmation. So, but in a stronger degree, does the subsequent act here. * * *

To consider *next* the question of law (*c*).

Next, whether this Court can set aside this legal contract upon arguments of conscience arising out of the case, and that in the utmost latitude. The proper jurisdiction of equity is, indeed, to take every one's act according to conscience, and not suffer undue advantage to be taken of the strict forms of positive rules. As this is only a ground of equity, it may indeed be made out by any sort of evidence upon all the circumstances; and on all together the Court cannot say the defendant is guilty of misbehaviour (which is not charged or suggested), or say this ought not to stand. Here is no fraud or over-reaching—no evidence from whence imposition is to be presumed; and the amount of the cases cited for the plaintiffs is, that the Court will relieve against fraud in this as in other cases.

But supposing these points against the plaintiffs, another and a very general question has been made of the first impression —*viz.*, supposing the transaction good in law and conscience, yet this Court should, for the sake of making a rule, set it aside on principles of policy or political reasoning; for, on fraud, there can be no case in which this Court will not relieve. No political principle can be stated on which it should be set aside; therefore, such a ground of determination is impossible in this Court.

(*c*) See note, *supra*, p. 251.

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There may be a difficulty to tell what sort of rule. It is admitted that no certain one can be drawn, because it would be dangerous when applied to particular cases; and it is, therefore, said Acts of Parliament cannot be made to meet cases of this kind. This Court does not exercise or assume a legislative power, but disclaims it, and never will make a law to set aside contracts on public principles out of that cause, if good in law and conscience, let the convenience or inconvenience be what it will. The contracts in Exchange-alley were all contingencies; yet it was necessary to have an Act (*d*) to set them aside, although easily proved inconvenient to the public. So, of fair and equal wagers, an Act of Parliament, 7 Anne, c. 16 (*e*), was forced to interpose. So of gaming—money won at a fair hazard, without cheating; this Court never set it aside before the Legislature interposed: so that political arguments are never taken into consideration. * * *

Lastly, as to the case of *post obits*, it is said where sons, whether in remainder, or otherwise, or *filius familias*, not having a fortune or emancipation of their own, are encouraged in riot and expense, the Court relieves, without evidence, from the particular purpose, because no son, in the life of his father, shall make such a bargain: but that is not the ground of relief, for that may be denied, like all other presumptions; from the reason of the thing, it is the misbehaviour to persons under this description to share in riot and encourage disobedience; which appears from Domat, under the general title "Loan"; * * * and in another place he says that, on a bargain with *filius familias*, under such circumstances there may be relief, under such not; not saying but that a son might, for a proportion, even when *filius familias*, do it. As to which an observation arises on the case determined by Lord Nottingham, who relieved against many of these contracts on particular evidence. Lord North thought he went too far; Lord Jefferies that he did not go far enough, which is not to be wondered at; for judging upon circumstantial evidence, they might draw different conclusions. Lord Nottingham's reasons, in his manuscript, show he did not think

(*d*) 7 Geo. 2, c. 8, and 10 Geo. 2, c. 8, repealed by 23 Vict. c. 28.
(*e*) Repealed Stat. Law Rev. Act, 1867.

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he was going on the general rule that a son could not sell a contingency. The case is entitled *Berny* v. *Pitt* (*f*). Berny was drawn into several securities for money, to be paid after his father's death, who then was infirm, and kept alive by art; by some he was to pay five for one, and thus was involved in debts to £50,000 or £60,000, in all which he appeared to be circumvented and beset; most of the money pretended to be borrowed, being raised by delivery of wares at an excessive price, as wine, hemp, etc., which could not be sold for a quarter of the price; but the plaintiff from his necessity (his creditors being underhand procured to fall upon him), was willing to get money on terms against which he sought relief. Lord Nottingham first made him pay the principal borrowed before he would give an injunction, but relieved him as to the rest at the hearing, because, he said, this infamous dealing ought to be suppressed. That the Star Chamber used to punish, and this Court ought to do it; and that no family could be safe if this was suffered. But Pitt prevailed, and the bill against him was dismissed, though he gained about three for one; for it was in the time of his father's health, three years before his death, without any circumvention or practice, upon an express agreement to lose the principal if the son died in his father's life; which shows the ground of the determination—relieving against those defendants guilty of misbehaviour, yet thinking that a proper bargain might be made by the heir. Lord Jefferies, on the evidence of that case when before him, laid a different stress, and relieved against Pitt also. From that time there is no case, until *Twistleton* v. *Griffith* (*g*), which turned on the particular fraud and circumvention. They cited further *Curwyn* v. *Milner* (*h*), *Lawley* v. *Hooper* (*i*), *Batty* v. *Lloyd* (*k*). * * * Contracts for contingencies have been admitted; *Beckley* v. *Newland* (*l*), *Hobson* v. *Trevor* (*m*), *Whitfield* v. *Fausset* (*n*). * * * But what is this public good which is not to be defined? Is the end proposed by this, that none shall spend above his annual income?

(*f*) 2 Ch. R. 396.
(*g*) 1 P. W. 310.
(*h*) 3 P. W. 293 (n.).
(*i*) 3 Atk. 278.
(*k*) 1 Vern. 141.
(*l*) 2 P. W. 182.
(*m*) 2 P. W. 191.
(*n*) 1 Ves. Sen. 387.

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That is not to be secured in human nature, or prevented. Though the Romans had that law, they were allowed to spend their estates. Is property to be locked up to another generation? —for that effect it will have, which is contrary to the principles of the constitution of the legal part of the Government; the later books, perhaps for 200 years, giving a reason why the statute *De Donis* (*o*) is not to be kept and preserved, that mankind may apply their property to pay their debts; and Judges have said there is great inconvenience in people not being able to sell their own estates. Is the end proposed that a man may raise money on easier terms if this is set aside? The consequence would be directly contrary. If one wants money, and a difficulty is laid upon contracting with fair, honest men, he will go into the hands of knaves, who will make him pay for running the risk of the law, and insist on more, when it is understood that he could not make a contingent bargain. This was not lent to feed riot, but to get rid of a pressure, which is a reasonable cause, and, therefore, no ground to set it aside on political motives. As the law cannot find out a general rule to proceed on, much less will this Court; and in every case where equity cannot relieve, it is not fit to be relieved.

February 4, 1750-1.

The Court (Burnett, J., Strange, M.R., Lee, C.J. (Willes, C.J., *absente*), Hardwicke, C.) delivered their opinion. [The judgments, other than that of Hardwicke, C., are omitted. They agreed with that of the Lord Chancellor.]

Lord Chancellor Hardwicke.—Before I proceed to give my own opinion in this case, I must take notice that Lord Chief Justice Willes has signified to me his entire concurrence on these three points.

Next, that the great and able assistance I have had in this case has made my task extremely easy; and, as I concur in the decree I am advised to make, the great pains taken in clearing up and considering the points might have excused me from taking

(*o*) 13 Edw. 1.

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up any time. One thing I ought to say in the outset—that if I could have foreseen upon what particular point the judgment in this case would fundamentally turn, I should have spared the Judges the trouble of this attendance. As three points have been properly made at the Bar, it is necessary to say something to each.

The *first* is a mere question of law upon the Statutes of Usury. * * * The *second* question is, supposing the first contract to be valid in law, whether it was contrary to conscience, and to be relieved against in this Court upon any head or principle of equity. I will follow the prudent example of not giving any direct and conclusive opinion. As it would be unnecessary, it is the safest not to do it; yet it has been made necessary to say something on it. It cannot be said that such contracts deserve to be encouraged, for they generally proceed from excessive prodigality on one hand, and extortion on the other, which are *vitia temporis*, and pernicious in their consequences; and then it is the duty of a Court, if it can, to restrain them.

This Court has an undoubted jurisdiction to relieve against every species of fraud.

(1) (*q*) *First*, then, fraud which is *dolus malus*, may be actual, arising from facts and circumstances of imposition; which is the plainest case.

(2) *Secondly*, it may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make on the one hand, and as no honest and fair man would accept on the other, which are inequitable and unconscionable bargains; and of such even the common law has taken notice; for which, if it would not look a little ludicrous, might be cited *James* v. *Morgan* (*r*).

(*q*) *Note.*—The numbers have been added for the sake of reference.

(*r*) 1 Lev. 111. This case is thus quaintly reported by Levinz : " Assumpsit de payer pur un chival, un Barly-corn a nail, et double every nail; et averr que la feuront 32 nails en less soliers del chival, que dublant chescun nail, veignant al 500 quarters de Barly. Et sur non assumpsit, le cause esteant try devant Hide al Hereford, il direct le jury pur donner le value del chival en damages esteant £8. Et issint ils fesoient et fuit apres move en arrest de judgment pur un petit fault en le declaration, que fuit over-rule : et judgment done pur le plaintiff."

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(3) A third kind of fraud is, which may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must be proved, not presumed; but it is widely established in this Court to prevent taking surreptitious advantage of the weakness or necessity of another, which knowingly to do is equally against conscience as to take advantage of his ignorance; a person is equally unable to judge for himself in one as the other.

(4) A fourth kind of fraud may be collected or inferred, in the consideration of this Court, from the nature and circumstances of the transaction, as being an imposition and deceit on the other persons not parties to the fraudulent agreement. It may sound odd that an agreement may be infected by being a deceit on others not parties; but such there are, and against such there has been relief. Of this kind have been marriage-brocage contracts, neither of the parties herein being deceived; but they tend necessarily to the deceit on the one party to the marriage, or of the parent, or of the friend. So, in a clandestine private agreement to return part of the portion of the wife, or provision stipulated for the husband, to the parent or guardian. In most of these cases it is done with their eyes open, and knowing what they do; but, if there is fraud therein, the Court holds it infected thereby, and relieves. So, where a debtor enters into a deed of composition with his creditors for 10s. in the pound, or any other rate, attended with a proviso that all creditors executed this within a certain period, if the debtor privately agrees with one creditor to induce him to sign this deed, that he will pay, or secure a greater sum in respect of his particular debt—in this there can be no particular deceit on the debtor who is party thereto, but it tends to deceit of the other creditors, who relied on an equal composition, and did it out of compassion to the debtor (*s*). This Court, therefore, relieves against all such *underhand bargains*. So of premiums contracted to be given for preferring or recommending to a public office or employment: none of the parties are defrauded; but the persons having

(*s*) *Mare* v. *Sandford*, 1 Gif. 288; *M'Kewan* v. *Sanderson*, 15 Eq. 229; 20 Eq. 65; *Re Lenzberg's Policy*, 7 Ch. D. 650.

the legal appointment of these offices are or may be deceived thereby: or if any person, agreeing to take the premium, has authority to appoint the officer, it tends to public mischief, by introducing an unworthy object for an unworthy consideration. These cases show what Courts of equity mean when they profess to go on reasons drawn from public utility. To weaken the force of such reasons, they have been called political arguments, and introducing politics into the decision of Courts of justice. This was showing the thing in the light which best served the argument for the defendant, but far from the true one, if the word "politics" is taken in the common acceptation; but if in its true original meaning, it comprehends everything that concerns the government of the country, of which the administration of justice makes a considerable part; and in this sense it is admitted always. To apply this: thus far, and in this sense, is relief in a Court of equity founded on public utility. Particular persons, in contracts, shall not only transact *bona fide* between themselves, but shall not transact *mala fide* in respect of other persons who stand in such a relation to either as to be affected by the contract, or the consequences of it; and as the rest of mankind, besides the parties contracting, are concerned, it is properly said to be governed on public utility.

(5) The last head of fraud on which there has been relief is that which infects catching bargains with heirs, reversioners, or expectants, in the life of the father, etc., against which relief always extended. These have been generally mixed cases, compounded of all or several species of fraud; there being sometimes proof of actual fraud, which is always decisive. There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting—weakness on one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain; which was the particular ground on which there was relief against Pitt, there being no declaration there of any circumvention, as appears from the book, but merely from the intrinsic unconscionableness of the bargain. In most of these cases have concurred deceit and illusion on other persons not privy to the fraudulent agreement. The father, ancestor,

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or relation, from whom was the expectation of the estate, has been kept in the dark; the heir, or expectant, has been kept from disclosing his circumstances and resorting to them for advice, which might have tended to his relief, and also reformation: this misleads the ancestor, who has been seduced to leave his estate, not to his heir or family, but to a set of artful persons, who have divided the spoil beforehand.

Consider which of these species is in the present case. There is no colour of evidence of actual fraud in the defendant, who did not think he was doing anything immoral or unjust; although, if the declarations of Mr. Spencer can be believed, the defendant had a misgiving how far it could be held good in this Court. But though this case is clearer of actual fraud than almost any that has come, yet several things are insisted on for the plaintiffs—as necessity on one side, and advantage taken of it on the other; unconscionableness in its nature, from the terms of paying two for one, in case of the death of an old woman, the next week or day; that there was deceit upon her, who was *in loco parentis*, from whom were his great expectations. This was, however, the thing intended. I admit also there are more circumstances alleged on the side of the defendant, to weaken and take off, than have concurred in most cases of this kind. Mr. Spencer was of the age of *thirty*; possessed of a great estate of his own; not weak in mind, but of good sense and parts—though in that the witnesses differ. If it was necessary to give an opinion upon this point, I should consider the weight of these objections, and the answers to them; but as it is not, I will only consider the contingency inserted, which was to cure the whole.

I would not have thought that the insertion of such a contingency would in every case sanctify such a bargain. Suppose such a bargain made by a son in the life of his father or grandfather, on whom was his whole dependency; I appeal to everyone, what the consequence of it would be. Whether such a contingency is inserted or not, it will come to the same thing, the creditor knowing the fund for payment must depend on the debtor surviving the father or grandfather, whether it is said so or not; and therefore I have always thought there was great

sense in what Vernon reports to be said by the Court in *Berny* v. *Pitt*, "that the expressing the death of the son in the life of the father makes the case worse."

I have not mentioned the reasons drawn from the discouragement of prodigality, and preventing the ruin of families—considerations of weight, and ingredients which the Court has often very wisely taken along with them. It is said, for the defendant, to be vain and wild for the Court to proceed on such principles. If it had been said it was ineffectual in many instances, I should have agreed thereto; but I cannot hold that to be vain and wild which the law of all countries, and all wise Legislatures, have endeavoured at as far as possible. The senate and lawmakers in Rome were not so weak as not to know that a law to restrain prodigality, to prevent a son running in debt in the life of his father, would be vain in many cases; yet they made laws to this purpose, *viz.*, the Macedonian decree (De Senatu Consulto Macedoniano, Dig. lib. xiv, tit. vi), already mentioned; happy if they could in some degree prevent it; *est aliquod prodire tenus.*

It is said for the defendant that this would be to assume a legislative authority, and that several Acts of Parliament have been thought necessary to restrain and make void contracts of a pernicious tendency to the public. What can properly be called such an assuming in this Court I utterly disclaim; but, notwithstanding, I shall not be afraid to exercise a jurisdiction I find established, and shall adhere to precedents. As far, therefore, as the Court went in *Berny* v. *Pitt* (*t*), in *Twistleton* v. *Griffith* (*u*), in *Curwyn* v. *Milner* (*x*), and the opinion of Lord Talbot on the original transaction in *Cole* v. *Gibbons* (*y*), so far, and as far as these principles do naturally and justly lead, I shall not scruple to follow. The Acts of Parliament (*z*) instanced will be found to be made (many of them), not for want of power in this Court to give relief in many of these contracts, *but to make them void in law, to give the party a short remedy against them.*

The judgment I am going to give will not be founded upon

(*t*) 2 Vern. 14.
(*u*) 1 P. W. 310.
(*x*) 3 P. W. 293 (n.).
(*y*) 3 P. W. 290.
(*z*) *I.e.*, the Acts against usury.

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this: but I have done it that the work of this day may not be misunderstood, or precedents thought to be shaken: not that this establishes such a contract as is called fair, like killing fairly in a duel, which the law does not allow as an excuse for murder. Junct annuities and post obits are grown into traffic, which ought to abate of its fairness.

As to the *last* question, of the subsequent acts of Mr. Spencer: this is the point on which the determination of this case will depend, and I entirely agree with the opinion delivered already. Had the first bond been void by the Statutes of Usury, no new engagement would have made it better; the original would have infected it. But if a man is fully informed, and with his eyes open, he may fairly release and come to a new agreement, and bar himself of relief, which might be had in this Court. The material inquiry is, whether this was done, after full information, freely, without compulsion, etc.; and upon the best consideration of the evidence, it appears to be so done, and with fairness.

First, the condition of the necessity of Mr. Spencer was over: for though he had no power over the capital of this accession of estate, yet it was so great a one, that little more than one-third of a year's income would have paid off the whole. If that, then, be a state of necessity, how far shall it be carried?

Then the state of expectancy was over by the death of the duchess, and also the danger of her coming to the knowledge of his conduct and circumstances, and his fear of offending her, which was the principal restraint upon him; so that there was no ancestor or relation left upon whom any deceit could be committed in consequence of any new agreement; and it appears that before this new bond he had sufficient notice that he had a chance, at least, that he might have relief in equity, from the defendant's own declaration to him of his doubt whether it would be good.

Lastly, there was no impediment against his seeking relief by disclosing the whole case at that time in a Court of justice.

Under these circumstances was the new engagement, without any fraud, contrivance, or surprise to draw him in, which operates more strongly than the deed of confirmation in *Cole* v.

Gibbons (*a*), that it is too much to set it aside. The only difference to distinguish that from this case was, that there the releasor was not in the power of the releasee; here Mr. Spencer was debtor (*b*), and his creditor might immediately have distressed him by an action: but the answer is, there was neither an attempt nor threat to bring an action. It is objected further for the plaintiffs that *Cole* v. *Gibbons* was a single case; and there are several precedents in which such new security and subsequent transaction were not sufficient to give a sanction to a demand of this kind, as in *Lord Ardglasse* v. *Muschamp*; but the circumstances there show it not to be at all applicable. Then the confirmation in *Wiseman* v. *Beake* (*c*) was still more extraordinary: and that was a very extraordinary invention of Serjeant Philips, of a bill to be foreclosed against a relief in equity. In both those cases the original transaction was grossly fraudulent; but I have only shown it here to be a doubtful object of relief in this Court, which surely is the most proper case of all others to put an end to by a new engagement.

On the whole, therefore, the only relief is that which I am advised to give against the penalty of the last bond.

The only doubt which could arise on this is as to costs, to which the defendant is not entitled. The plaintiffs are only executors; they had a probable cause of litigating this contract, which is far from deserving favour, and were in the right to submit it to the judgment of the Court; and it is observable that in *Cole* v. *Gibbons*, which was on this point, the bill was dismissed without costs, and no costs given on the bill, but, on the contrary, deducted. There was indeed, in that case, no penalty, as there is here; but still that does not take away the discretion of this Court in respect of costs, according to the circumstances of the case; and there are several cases of a bond with a penalty disputed, where, though the costs at law will undoubtedly follow the demand, yet on the circumstances, costs in this Court are refused.

Therefore, let it be referred to the Master to take an account of the principal and interest due on the bonds of 1744, and the

(*a*) 3 P. W. 290.
(*b*) See *Fox* v. *Mackreth*, *post*.
(*c*) 2 Vern. 121.

judgment thereon, and to tax the defendant his costs at law, and an account of the money paid by Mr. Spencer to the defendant; and let that first be applied to discharge the interest, and then to sink the principal, and all just allowances be made; and, on payment by the plaintiffs to the defendant of what is found due, let the defendant deliver up the bond to be cancelled, and acknowledge satisfaction on the judgment: but that must be at the expense of the plaintiffs. And, if the plaintiffs pay what is so found due, let there be no costs in this Court on either side; but, otherwise, let the bill be dismissed with costs.

NOTES.

1. Generally.
2. What dealings with reversionary interests are unimpeachable, p. 274.
3. What constitutes inadequacy of price, p. 276.
4. Statutory provisions as to sales of reversions, p. 277.
5. Money-lenders Acts, 1900 and 1927, p. 282.
6. As to terms upon which an unconscionable bargain will be set aside, p. 288.
7. Confirmation and acquiescence, p. 290.

1. Generally.

Chesterfield v. *Janssen* is a case of very frequent reference, celebrated alike for the able arguments of the counsel on both sides, and for the opinions of the learned Judges who assisted Lord Hardwicke, but especially for the elaborate and learned judgment of Lord Hardwicke, in which he has classified the different species of frauds against which equity will give relief.

Having regard to modern authorities, it is convenient that the word "Fraud" should be restricted to the first head of fraud dealt with by Lord Hardwicke, that is, to cases in which there is some moral delinquency, some actual intentional fraud, and that the remaining divisions should be classified under the head of "Constructive Fraud" (*d*), which includes those numerous cases in which equity gives relief against acts and contracts, although untainted by any actual evil design, on the ground of general public policy or on some fixed artificial policy of the law.

It is proposed in this note to deal only with that species of constructive fraud in which equity gives relief on account of the

(*d*) Cf. Story, Eq. Jur. (1892), p. 164.

hardness or unfairness of the bargain (*e*). Speaking of catching bargains with heirs, &c., which is only a branch of this subject, Lord Hardwicke says : " These have been generally mixed cases, compounded of all or several species of fraud, there being sometimes proof of actual fraud, which is always decisive. There is always fraud *presumed or inferred* from the circumstances or conditions of the parties contracting—weakness on the one side, usury on the other, or extortion or advantage taken of that weakness. There has been always an appearance of fraud from the nature of the bargain. * * *"

Referring to this passage in Lord Hardwicke's judgment, Lord Selborne, in *Aylesford* v. *Morris* (*f*), said : " Fraud does not here mean deceit or circumvention : it means an unconscientious use of the power arising out of these ' circumstances and conditions ' ; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just, and reasonable." The chief matters to be considered are, Is the bargain a hard one? (*g*); Has an unfair advantage been taken? (*h*); Were the parties on equal terms? (*i*).

Indequacy of Price.—Mere inadequacy of price, unless it were the result of fraud, surprise, or misrepresentation (*k*), has never been a sufficient ground to set aside a purchase of *interests in possession*, unless the inadequacy were so gross as to be of itself clear evidence of unfair dealing. " To set aside a conveyance," says Lord Thurlow, " there must an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common sense without producing an exclamation at the inequality of it " (*l*).

(*e*) See the judgment, *supra*, Classes 2, 3, 5.

(*f*) L. R. 8 Ch., at pp. 490, 491. See also *Miller* v. *Cook*, 10 Eq. 641; *Tyler* v. *Yates*, L. R. 6 Ch. 665; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *O'Rorke* v. *Bolingbroke*, L. R. 2 A. C., at p. 833.

(*g*) *Beynon* v. *Cook*, L. R. 10 Ch., at p. 391.

(*h*) *Middleton* v. *Brown*, 47 L. J. Ch. 411.

(*i*) *Wood* v. *Abrey*, 3 Madd. 417.

(*k*) *Evans* v. *Llewellin*, 2 Bro. Ch. 150; 1 Cox, 339; *Pickett* v. *Loggon*, 14 V. 215; *Reynell* v. *Sprye*, 8 Ha. 222; 1 De G. M. & G. 660; *Harrison* v. *Guest*, 8 H. L. C. 481.

(*l*) *Gwynne* v. *Heaton*, 1 Bro. Ch. 8; and see *James* v. *Morgan*, 1 Lev. 111; *Stilwell* v. *Wilkins*, Jac. 280; *Longmate* v. *Ledger*, 2 Giff. 157; *Haygarth* v. *Wearing*, 12 Eq. 320; *Tennent* v. *Tennents*, L. R. 2 H. L. Sc. 6; *Wilton* v. *Osborn*, [1901] 2 K. B. 110.

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But, with regard to expectants (*m*), and reversioners (*n*), the authorities clearly show, even in the absence of the different species of frauds which are frequently ingredients in such transactions, that *mere inadequacy of price* was a sufficient ground, before the Sales of Reversions Act (see note 4, *infra*), for rescinding contracts or dealings with them for their expectancies or reversionary interests. In such cases the onus was on the purchaser to show that he had given the "fair" value (*o*), or the "market value" (*p*). Even after that Act undervalue remains a material element in cases in which relief is claimed on other grounds, *e.g.*, inequality of the parties, and on proof of the inequality or other ground relied on the other contracting party must show that the transaction has been fair, just, and reasonable (*q*).

"*Expectants*"; "*Expectant Heirs.*"—"The phrase is used, not in its literal meaning, but as including everyone who has either a vested remainder or a contingent remainder in a family property, including a remainder in a portion, as well as a remainder in an estate, and everyone who has the hope of succession to the property of an ancestor, either by reason of his being the heir-apparent or presumptive, or by reason merely of the expectation of a devise or bequest on account of the supposed or presumed affection of his ancestor or relation. More than this, the doctrine as to expectant heirs has been extended to all reversioners and remaindermen, as appears from *Tottenham* v. *Emmet* (*r*), and *Earl of Aylesford* v. *Morris* (*s*). So that the doctrine not only includes the class I have mentioned, who in some popular sense might be called expectant heirs, but also all remaindermen and reversioners" (*t*). In *Nevill* v. *Snelling* (*u*) the principle was extended to the case in which the plaintiff was a minor, without any property or any expectation of any, except such as was founded on his father's position in life.

(*m*) *Wiseman* v. *Beake*, 2 Vern. 121; *Cole* v. *Gibbons*, 3 P. W. 290; *King* v. *Savery*, 1 Sm. & G. 271.

(*n*) *Bawtree* v. *Watson*, 3 My. & K. 330; *Davies* v. *Cooper*, 5 My. & C. 270; *Edwards* v. *Browne*, 2 Coll. Ch. R. 100.

(*o*) *Aldborough* v. *Trye*, 7 Cl. & Fin. 436, 456.

(*p*) *Talbot* v. *Stainforth*, 1 John. & H. 484, 503.

(*q*) See judgment of Selborne, C., *Aylesford* v. *Morris*, L. R. 8 Ch., at pp. 490—491; *Brenchley* v. *Higgins*, 70 L. J. Ch. 788; and see *O'Rorke* v. *Bolingbroke*, 2 A. C., at p. 834, where this burden of proof was held to be satisfied. See also Kerr on Fraud (5th ed.), 204.

(*r*) 14 W. R. 3.

(*s*) L. R. 8 Ch. 484.

(*t*) *Per* Jessel, M.R., in *Beynon* v. *Cook*, L. R. 10 Ch. 391. See also *Fry* v. *Lane*, 40 Ch. D. 312.

(*u*) 15 Ch. D. 679.

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The money was borrowed from a money-lender simply on the credit of such expectations, and was advanced in the hope of extorting money from the father by threatening his son with bankruptcy. Denman, J., after reviewing the authorities, held that the securities should stand for the sums actually advanced, with five per cent. interest. " I can find no case," he said, " which decides that the interference of the Court is limited to cases in which the dealings have been with expectant heirs or reversioners, or to cases in which the dealing has been one in relation to the expectancy. * * * The real question in every case seems to me to be whether the dealings have been * * * fair, and whether undue advantage has been taken by the money-lender of the weakness or necessities of the person raising the money " (*x*). In *James* v. *Kerr* (*y*) a person who merely claimed a share of real estate, but who entered into a hard bargain, was treated as being in a position analogous to an expectant heir. These cases, with the exception of *Tottenham* v. *Emmet*, were subsequent to the Sales of Reversions Act, 1867 (*infra*, note 4).

Application of the Rule.—These transactions most frequently come before the Courts in the shape of loans, sales, and mortgages, contracted or effected by expectants (*z*).

Where a reversioner had *mortgaged* his estate, or had granted an *annuity*, or had given a *bond or other security* for the payment of a sum of money or an annuity at the death of his father, the transaction, unless it appeared to be reasonable or the price adequate, would be set aside upon proper terms (*a*). But in *Benyon* v. *Fitch* (*b*), the Court, under the circumstances, held the mortgagee entitled to the amount for which the mortgagor had given bills, and not simply to the money actually advanced upon them.

In *Re Maskell, etc., Contract* (*c*) it appeared on the face of the

(*x*) 15 Ch. D., at pp. 702, 703. And see judgment of Hatherley, C., in *O'Rorke* v. *Bolingbroke*; cited *infra*, p. 281; *Croft* v. *Graham*, 2 De G. J. & S. 155; *Bromley* v. *Smith*, 26 B. 644; *Tyler* v. *Yates*, L. R. 6 Ch. 665; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Saunders* v. *Newbold*, [1905] 1 Ch. 260; [1906] A. C. 461.

(*y*) 40 Ch. D. 449. And see *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; Kerr on Fraud (5th ed.), 197

(*z*) *Curwyn* v. *Milner*, 3 P. W. 293 (n.); *Peacock* v. *Evans*, 16 V. 512; and see *Freme* v. *Brade*, 2 De G. & J. 582; *Rees* v. *De Bernardy*, *supra*.

(*a*) *Barny* v. *Beak*, 2 Ch. Ca. 136; *Wiseman* v. *Beake*, 2 Vern. 121; *Berny* v. *Pitt*, 2 Vern. 14; *Gwynne* v. *Heaton*, 1 Bro. Ch. 1; *Smith* v. *Kay*, 7 H. L. C. 750; *Bromley* v. *Smith*, 26 B. 644; *Pennell* v. *Millar*, 23 B. 172; *Tottenham* v. *Emmet*, 14 W. R. 3; *Tottenham* v. *Green*, 32 L. J. Ch. 201.

(*b*) 35 B. 570.

(*c*) [1895] 2 Ch. 525; Fry (6th ed.), 417.

title that the purchase money paid by the vendor to certain infants, parties by feoffment to a conveyance of gavelkind lands, was not the full value of their shares, and that they were still under twenty-one. The Court held that the title could not be forced on the purchaser.

The application of the rule is not prevented by the fact, that the expectant heir was a person of mature age (*d*), nor that he perfectly understood the nature and extent of the transaction; nor is it necessary for the heir to show that he was in pecuniary distress at the time (*e*).

The onus, before the Sales of Reversions Act (*f*), lay upon the person dealing with a reversioner or expectant, to show that the transaction was reasonable, and the price given adequate (*g*); and that Act does not, it seems, relieve him from the burden of showing the fairness of the transaction, though it will no longer be set aside merely for inadequacy of consideration (*h*).

If the bulk of the property sold is reversionary, the mere fact of a part of it being in possession does not prevent the application of the rule of equity with respect to sales of interests in reversion (*i*).

The fact that the reversion depended upon contingencies that were supposed to be incapable of being valued by actuaries (*k*), did not relieve the purchaser from the burden of showing that the full value was given (*l*).

Sub-purchasers and persons taking with notice a transfer of

(*d*) *Earl of Portmore* v. *Taylor*, 4 Si. 182; *Davis* v. *Marlborough*, 2 Swans. 143; and see the principal case, p. 263, *supra*; *Clark* v. *Malpas*, 4 De G. F. & J. 401; *Tynte* v. *Hodge*, 2 Hem. & M. 287, 296; *Beynon* v. *Cook*, L. R. 10 Ch. 389; *Helsham* v. *Barnett*, 21 W. R. 309; *Howley* v. *Cook*, 8 Ir. R. Eq. 570; *Wiseman* v. *Beake*, 2 Vern. 121, where the plaintiff was nearly forty, and was a proctor.

(*e*) *Bromley* v. *Smith*, 26 B. 644; *St. Albyn* v. *Harding*, 27 B. 11; *Foster* v. *Roberts*, 29 B. 467; *Emmet* v. *Tottenham*, 10 Jur. (N.S.) 1090.

(*f*) Repealed and replaced by section 174 of the L. P. Act, 1925.

(*g*) *Gowland* v. *De Faria*, 17 V. 20; *Davies* v. *Cooper*, and *Cooper* v. *Jackson*, 5 My. & C. 270; *King* v. *Savery*, 5 H. L. C. 627; *Edwards* v. *Burt*, 2 De G. M. & G. 55; *Salter* v. *Bradshaw*, 26 B. 161; *Bromley* v. *Smith*, *supra*; *St. Albyn* v. *Harding*, *supra*; *Foster* v. *Roberts*, *supra*; *Talbot* v. *Staniforth*, 1 J. & H. 484; *Dally* v. *Wonham*, 33 B. 154.

(*h*) *Brenchley* v. *Higgins*, 70 L. J. Ch. 788; the language of the Court of Appeal appears to support this statement, though the decision itself may be explained by the fact that "the circumstances quite apart from the inadequate price considered alone, [showed] that there was unfair dealing," 83 L. T. 753.

(*i*) *Davis* v. *Marlborough*, 2 Swans. 154; *Earl of Portmore* v. *Taylor*, 4 Si. 182; and see *Nesbitt* v. *Berridge*, 4 De G. J. & S. 54; *Webster* v. *Cook*, L. R. 2 Ch. 542; *Tyler* v. *Yates*, 11 Eq. 265; L. R. 6 Ch. 665.

(*k*) See *Baker* v. *Bent*, 1 Russ. & M. 224; *Davies* v. *Cooper*, 5 My. & C. 270; *Boothby* v. *B.*, 1 Mac. & G. 604.

(*l*) *Talbot* v. *Staniforth*, 1 John. & H. 484; *Woodroffe* v. *Allen*, 1 Hayes, & J. 73.

securities impeachable as unconscionable, will be bound by the same equities as the parties to the original transaction (*m*).

Equity will also give relief, especially in the case of an expectant heir, against usurious loans (see now the Money-lenders Acts, 1900 and 1927, *infra*) effected under the mask of trading, where, instead of money being actually advanced, goods are supplied by a tradesman, merely for the purpose of being at once sold, and will in general set aside such transactions upon payment of what the goods produced upon a re-sale, and interest (*n*). In *Barker* v. *Vansommer* (*o*), a young man, immediately upon coming of age, and wanting to raise money, gave a bond for the price of some silks to be re-sold by him. "I take it," said Lord Thurlow, on setting aside the transaction, "as an advancement of goods, instead of money to supply his necessities." But the decision turned on the transaction being a loan at usurious interest (*p*). In *King* v. *Hamlet* (*q*), Brougham, C., refused to relieve against a mortgage of a reversionary interest given by an heir in necessitous circumstances, for the price of goods reasonably and fairly charged, which were immediately sold to raise money, at a loss on the whole transaction of £60 per cent. The decision in this case was founded principally upon the proposition, to the effect, that where the heir deals, not behind the back of his father, but with his sanction and assistance, and has all the protection his father can give him, he is not entitled to relief. But this proposition has been questioned (*r*), and it may now be considered as established, notwithstanding the law as laid down by Lord Brougham, that the mere fact that the dealings with regard to an expectancy are known to his father's family or friends, or even that the person so dealing had professional advice, though material as evidence in rebutting the presumption of oppression and extortion (*s*), is not sufficient of itself to prevent relief in a proper case from being given (*t*).

(*m*) *Nesbitt* v. *Berridge*, 4 De G. J. & S. 45; *Tottenham* v. *Green*, 32 L. J. Ch. 201; *Addis* v. *Campbell*, 4 B. 401.

(*n*) *Waller* v. *Dalt*, 1 Dick 8; *Barney* v. *Beak*, 2 Ch. Ca. 136.

(*o*) 1 Bro. Ch. 149.

(*p*) See *King* v. *Hamlet*, 2 My. & K. 485.

(*q*) 2 My. & K. 456, affirmed 3 Cl. & Fin. 218, but without stating reasons.

(*r*) See *Talbot* v. *Staniforth*, 1 John. & H. 484, 502; Sugden, V. & P. (14th ed.), 277; Dart (7th ed.), 751; *Savery* v. *King*, 5 H. L. C. 627; *O'Rorke* v. *Bolingbroke*, 2 A. C. 814, 828.

(*s*) *O'Rorke* v. *Bolingbroke*, 2 A. C. 814.

(*t*) *Talbot* v. *Staniforth*, *supra*; *Savery* v. *King*, *supra*; *Miller* v. *Cook*, 10 Eq. 641, 647; *Edwards* v. *Browne*, 2 Coll. Ch. R. 100; *Playford* v. *P.*, 4 Ha. 546; and see *Brenchley* v. *Higgins*, 82 L. T. 143; 83 L. T. 751.

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Extension of the Principle.—Denman, J., commenting upon the distinction drawn by Courts of equity between the cases of expectant heirs and other persons, points out that even in the case of the former, stress is often laid upon other circumstances rather than upon their position as expectant heirs, and concludes that it is impossible to say, as a whole, that the Court will not interfere in any given case, though it may be a case in which that particular ground of interference does not exist, and he concludes that if the facts are such that the Court would have interfered before the repeal of the usury laws, it will still interfere except so far as the objections are founded upon the usury laws alone (*u*). The principle on which equity originally proceeded in setting aside transactions of this kind was the protection of family property, but it has been extended *to all cases in which the parties to a contract have not met upon equal terms.* In the case, therefore, of expectant heirs, *or of persons under pressure without adequate protection*, and in the case of dealings with uneducated ignorant persons, the burthen of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract (*x*). The following are typical cases :—In *Wood* v. *Abrey* (*y*), where the only professional person employed was the purchaser's solicitor, and the price was one-fourth of the value, and the vendor was in distressed circumstances; in *Longmate* v. *Ledger* (*z*), where property in possession was sold at an undervalue, and one solicitor acted for both parties, and the vendor was aged, infirm, and weak-minded; in *Baker* v. *Monk* (*a*), where the vendor was an elderly woman in humble life, and the same solicitor acted for all parties. In *James* v. *Kerr* (*b*), K., a solicitor, advanced money to J., a man in poor circumstances, to enable him to meet the costs of a suit in which he claimed real estate, and J. gave K. a mortgage to secure £225 " by way of bonus " if he won, and further advances. J. was held to be in a position analogous to that of an " expectant heir," and was allowed to redeem on payment of sums actually advanced.

(*u*) *Nevill* v. *Snelling*, 15 Ch. D., at pp. 696, 702; see now Money-lenders Acts, 1900 and 1927, *infra*.

(*x*) *O'Rorke* v. *Bolingbroke*, L. R. 2 Ch., at p. 823; *Nevill* v. *Snelling*, *supra*, p. 324; *Prees* v. *Coke*, L. R. 6 Ch. 645; *Evans* v. *Llewellin*, 1 Cox, 333; *Haygarth* v. *Wearing*, 12 Eq. 320; *Clark* v. *Malpas*, 4 De G. F. & J. 401; *Fry* v. *Lane*, 40 Ch. D. 312.

(*y*) 3 Madd. 417, 423.

(*z*) 2 Giff. 157

(*a*) 4 De G. J. & S. 388.

(*b*) 40 Ch. D. 449. And see *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

In short, wherever a purchase is made at a considerable undervalue from a person who is poor, or ignorant, or weak, and the vendor has no independent advice, the transaction may be set aside (*c*).

A further extension of the principle is given by the Moneylenders Acts, 1900 and 1927 (*d*), which are not limited to cases in which before the Act equity would have given relief (*e*).

2. What Dealings with Reversionary Interests are Unimpeachable.

Family Arrangements.—In regarding claims to upset re-settlements of family estates, the Court gives weight to considerations which in other cases would not be allowed in the scale. For the validity of such an arrangement, the son being tenant in tail in remainder, it is not essential that the son should have independent advice, and the Court will not inquire whether the influence of the father was exerted with more or less force (*f*).

But the transaction must be strictly a family arrangement; so where a tenant for life purchased from his nephew the reversion in the family estate, without any provision for its resettlement, it was held that the case fell within the general rule as to dealings with reversionary interests (*g*). A settlement by an heir in favour of his wife and children is not within the doctrine laid down in the principal case (*h*).

Sale by Auction.—The sale of a reversionary interest by auction, if fairly conducted (*i*), rendered it unnecessary, even before the Sales of Reversions Act, 1867, for the purchaser to show that he had given an adequate price, unless the circumstances were such as to affect the purchaser with notice of any impropriety in the transaction (*k*).

Other Cases.—When the vendor and purchaser concur in a

(*c*) *Fry* v. *Lane*, 40 Ch. D., at p. 322; and see as to lunatics, *Manby* v. *Bewicke*, 3 Kay & J. 342; *Nelson* v. *Duncombe*, 9 B. 211; *Cooke* v. *Clayworth*, 18 V. 12; *Matthews* v *Baxter*, L. R. 8 Ex. 132. But cf. *Wolfe* v. *Lowther*, 31 T. L. R. 354.

(*d*) *Infra*, note 5.

(*e*) *Samuel* v. *Newbold*, [1906] A. C. 461.

(*f*) See notes to *Stapilton* v. *S.* and *Huguenin* v. *Baseley*, *supra*; and see *Hoblyn* v. *H.*, 41 Ch. D. 200.

(*g*) *Talbot* v. *Staniforth*, 1 John. & H. 484.

(*h*) *Shafto* v. *Adams*, 4 Giff. 492.

(*i*) See the Sale of Land by Auction Act, 1867, 30 & 31 Vict. c. 48; Dart (7th ed.), p. 121; the Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 58

(*k*) See *Shelly* v. *Nash*, 3 Madd. 232; and *Fox* v. *Wright*, 6 Madd. 111; where post-obit bonds to raise £40,000 were sold by auction without reserve.

valuation of a reversionary interest previously to the sale, by persons of competent skill, adequate value may be presumed (*l*); and so where a fair test of the market value can be obtained by the knowledge of the highest bid for it upon a previous attempt to sell it by auction (*m*). And the fact that a reversionary interest had been offered to and declined by many persons for a certain sum may be a sufficient reason for the Court declining to set aside a subsequent sale for the same price (*n*).

But where, before the Sales of Reversions Act, upon the sale by private contract of a reversionary interest in leaseholds, nothing was done except obtaining the opinion of an actuary unacquainted with the local circumstances likely to influence the value, and in a suit to impeach the sale, the purchaser was unable to show that he had given the full value, the sale was set aside (*o*).

The purchase of a lot by private contract at an inadequate price would be set aside, although assigned by the same deed with a lot purchased by public auction (*p*).

The rule as to the sale of reversionary interests is not applicable to a sale of property by the reversioner and the person having the prior interest; if, for instance, the father tenant for life, and the son remainderman in tail, concur together in selling estates, they form in fact, one vendor, *with a present interest*, and meet a purchaser with the same advantages as if a single person had the whole power over the estate; the onus, therefore, would not lie upon the purchaser, of showing that he gave an adequate price (*q*), unless other circumstances exist which might throw the onus upon the purchaser, as in the case of a purchase by an attorney from his client, or in the case of undue parental influence having been used (*r*).

The rule as to the sale of reversionary interests will not apply in the absence of any circumstances such as those referred to by Lord Hatherley in *O'Rorke* v. *Bolingbroke* (*s*), if the vendor is

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(*l*) *Edwards* v. *Burt*, 2 De G. M. & G., at p. 63.

(*m*) *Lord* v. *Jeffkins*, 35 B. 7.

(*n*) *Moth* v. *Atwood*, 5 V. 845; *Perfect* v. *Lane*, 3 De G. F. & J. 369; but see *Roche* v. *O'Brien*, 1 Ball & B. 330.

(*o*) *Edwards* v. *Burt* (1852), 2 De G. M. & G. 55; see *Edwards* v. *Browne*, 2 Coll. Ch. R. 100.

(*p*) *Newton* v. *Hunt*, 5 Si. 511.

(*q*) See *Wood* v. *Abrey*, 3 Madd. 422; *Cooke* v. *Burtchaell*, 2 Dr. & War. 165; *Sibbering* v. *Earl of Balcarres*, 3 De G. & Sm. 735, 736.

(*r*) *King* v. *Savery*, 5 H L C. 627. See also *Hannah* v. *Hodgson*, 30 B. 19.

(*s*) 2 A. C., at p. 823.

entitled to what is substantially an estate in possession, and the reversion subject only to an intervening life estate (*t*), nor where the contract is entered into between a tenant and the person entitled to the reversion and to the rents during the term (*u*). Where A, being entitled to a life interest in certain funds, subject to an annuity and other charges thereon which absorbed nearly the whole income, agreed in consideration of £1,000 to pay £3,300 to B upon the death of the annuitant, it was held not to be a case of dealing with a reversionary interest (*x*).

Where, even before the Sales of Reversions Act (*y*) came into operation, a person dealing with an heir or reversioner showed that the transaction was reasonable, and that a fair price had been given, either for a reversionary interest, annuity, or *post obit* bond, a Court of equity would not, in the absence of fraud, set it aside (*z*).

When the vendor had stated in his proposals the value of the *corpus* of the property, the onus was upon him to allege and prove that the value was understated (*b*); and where the vendor refuses all professional advice and presses the sale it will be upheld, although the other circumstances of the case would have justified relief (*c*).

A fair agreement between expectants or heirs, to divide the property which may be left between them, or to any one of them, is not contrary to public policy, and specific performance has been enforced (*d*).

3. What Constitutes Inadequacy of Price.

There is no rule in our law as to what difference between the real value of the property and the consideration paid constitutes inadequacy of price; this the Judge must decide, having regard

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(*t*) *Wardle* v. *Carter*, 7 Si. 490; cf. *Nesbitt* v. *Berridge*, 32 B. 282.

(*u*) *Scott* v. *Dunbar*, 1 Moll 459.

(*x*) *Webster* v. *Cook*, L. R. 2 Ch. 542; but see *Tyler* v. *Yates*, 11 Eq. 265; *Howley* v. *Cook*, 8 Ir. R. Eq. 570. See *Webster* v. *Cook*, more fully stated, *infra*, p. 279—280.

(*y*) Replaced by L. P. Act, 1925, s. 174. See *infra*, note 4.

(*z*) *Dews* v. *Brandt*, Ch. Ca. 7; *Batty* v. *Lloyd*, 1 Vern. 141; *Wharton* v. *May*, 5 V. 27; *Curling* v. *Townshend*, 19 V. 634; *Aidborough* v. *Trye*, 7 Cl. & Fin. 436.

(*b*) *Perfect* v. *Lane*, 3 De G. F. & J. 369.

(*c*) *Harrison* v. *Guest*, 8 H. L. C. 481.

(*d*) *Beckley* v. *Newland*, 2 P. W. 182. See also *Wethered* v. *W.*, 2 Si. 183; *Harwood* v. *Tooke*, 2 Si. 192; *Hyde* v. *White*, 5 Si. 524.

to the circumstances existing at the date of the contract, and not to subsequent events (*e*).

In many cases sales of reversions were set aside for inadequacy where the difference between the assumed value and the price given was very small (*f*). In *Foster* v. *Roberts* (*g*), the M.R. said : " I consider the present state of the law on this subject practically to amount to this—*that unless a person gives much more than the value it is impossible, save under a sale by auction, to purchase a reversionary interest with safety.*"

When it becomes necessary to consider the value of a reversionary interest, much difficulty arises from the conflicting evidence usually given—on the one hand, by auctioneers and surveyors, who estimate the value by the *market price*; on the other, by actuaries, who generally estimate the value according to the tables. It is, however, now fully established, that, in calculating the value of a reversionary interest, the Court will be guided, not by the tables, but by the " market value," which is generally about two-thirds of the estimated value (*h*); and in the case of real estate, its nature, position, and other particulars ought to be considered as affecting the value of the interest sold (*i*).

4. Statutory Provisions as to Sales of Reversions.

The Law of Property Act, 1925, repeals the Sales of Reversions Act, 1867, and re-enacts the same, in substance, by section 174 of the Law of Property Act, 1925, which is in the following terms—

" 174.—(1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of undervalue.

" In this sub-section ' reversionary interest ' includes an expectancy or possibility.

(*e*) See *O'Rorke* v. *Bolingbroke*, 2 A. C., at p. 829; *Perfect* v. *Lane*, 3 De G. F. & J. 369; *Gowland* v. *De Faria*, 17 V. 20; *Boothby* v. *B.*, 1 H. & Tw. 214; Kerr, on Fraud (5th ed.), p. 205; and see *Rees* v. *De Bernardy*, [1896] 2 Ch. 437.

(*f*) *Edwards* v. *Browne*, 2 Coll. C. C. 100; *Edwards* v. *Burt*, 2 De G. M. & G. 62; *Jones* v. *Ricketts*, 31 B. 130.

(*g*) 29 B. 467, 471.

(*h*) Dart (7th ed.) (1905), ii. p. 754, citing *Potts* v. *Curtis*, You. 543, Sug. 279; *Bettyes* v. *Maynard*, 31 W. R. 461.

(*i*) See *Hincksman* v. *Smith*, 3 Russ. 433; *Headen* v. *Rosher*, M'Cle. & Yo. 89; *Newton* v. *Hunt*, 5 Si. 511; *Wardle* v. *Carter*, 7 Si. 490; *Ryle* v. *Swindells*, M'Cle. 519; *Edwards* v. *Browne*, 2 Coll. C. C. 100; *Davies* v. *Cooper*, 5 My. & C. 270; *Aldborough* v. *Trye*, 7 Cl. & Fin. 436; *Bernal* v. *Donegal*, 3 Dow. 133; *Edwards* v. *Burt*, 2 De G. M. & G. 55, 57; *Perfect* v. *Lane*, 3 De G. F. & J. 369; *Tynte* v. *Hodge*, 2 Hem. & M. 287.

" (2) This section does not affect the jurisdiction of the Court to set aside or modify unconscionable bargains."

Referring to the words " *bonâ fide* and without fraud or unfair dealing," Lord Selborne observed : " The Act is carefully limited to purchases made *bona fide*, and without fraud or unfair dealing, and leaves undervalue still a material element in cases in which it is not the sole equitable ground of relief. These changes in the law *have in no degree whatever* altered the *onus probandi* in those cases which, according to the language of Lord Hardwicke, raise *from the circumstances* or conditions of the parties contracting—weakness on one side, usury on the other, or extortion, or advantage taken of that weakness—*a presumption of fraud*" (*k*).

There were no words in the Act of 1867 corresponding to subsection 2 of section 174 of the Act of 1925; but the earlier enactment was construed by the Courts as not interfering with the jurisdiction of Courts of equity to set aside or modify unconscionable bargains.

In *Miller* v. *Cook* (*l*) the defendant, a money-lender, having agreed with the plaintiff, who was just twenty-one years of age, and was in difficulties, to lend him £150 on his reversionary interest under his father's will, exacted securities for £200, with interest at 20 per cent., reducible to 10 per cent. on punctual payment, and advanced only £123, but claimed interest on the whole amount secured, and there were immediate powers of sale on non-payment of principal and interest upon a certain day. The plaintiff had been assisted by Mr. Ring, a solicitor, who, however, stated that he had not been accurately informed of the transaction. Stuart, V.-C., held, that the transaction being unconscionable, the deeds executed by the plaintiff should only stand as securities for the moneys actually advanced with interest at 5 per cent. " As to the argument," said his Honor, " on the recent statute, concerning dealings with reversionary interests, the exception in the statute as to unfairness leaves the settled law as to cases like the present untouched. Nor is the case of the defendant assisted by the presence of Mr. Ring, who appeared as the plaintiff's friend. The evidence shows that the advice of Mr. Ring was founded on misunderstanding or misrepresentation. * * * In the present

(*k*) *Earl of Aylesford* v. *Morris*, L. R. 8 Ch., at p. 490; *O'Rorke* v. *Bolingbroke*, 2 A. C., at p. 833; *Fry* v. *Lane*, 40 Ch. D. 312; *James* v. *Kerr*, 40 Ch. D. 449; and see *Rae* v. *Joyce*, 29 L. R. Ir. 500.

(*l*) 10 Eq. 641; see Money-lenders Acts, *infra*.

case, besides the other objections to the contract, the terms of the powers of sale are oppressive, and put the plaintiff completely at the mercy of the defendant. The power to sell without any notice to the plaintiff enabled the defendant at any moment to extinguish the right of redemption (*m*).

In *Tyler* v. *Yates* (*n*), where a young man charged a reversion with exorbitant sums for interest on loans principally made to his brother, an infant, on bills of exchange which he had accepted for the infant, it was held by Hatherley, C., affirming the decision of Stuart, V.-C., that the charges so given should stand as security for the sums actually advanced with interest at 5 per cent. (*o*).

In *Earl of Aylesford* v. *Morris* (*p*) the plaintiff, then a young nobleman in his twenty-second year, entitled to a large property in the event of his surviving his father, being largely indebted, upon the introduction of a creditor applied to Morris, who advanced £3,000 in payment of the debt, and £3,800 to the plaintiff, taking his acceptance at three months for £8,000, the difference, £1,200, being retained by Morris as discount at the rate of 1s. in the pound per month. At the same time an insurance was effected on the plaintiff's life for £6,000, the first premium being paid by the plaintiff out of the money advanced. The acceptance of £8,000 becoming due on October 4, 1870, the plaintiff, through the agency of one Addison, had his acceptance of £8,000 cancelled, giving Morris bills dated December 19 at three months for £11,000 and receiving a balance of £207 only, the rest of the money beyond the £8,000 being for discount, extra payment on the policy of assurance, and £275 commission paid to Addison. The plaintiff had no professional assistance in these matters, and no application was made to his father or to the solicitor of the father. Selborne, C., held, affirming the decree of Wickens, V.-C., that a decree ought to be made for delivering up the bills on payment of the sums actually advanced and interest at 5 per cent.

In *Webster* v. *Cook* (*q*), the plaintiff being entitled to a life interest in an estate, subject to two jointures of £1,000 and £500 a year, and to a mortgage of £23,000, by an indenture dated

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(*m*) As to the objection referred to in this case of a mortgage containing an immediate power of sale, see *Deverges* v. *Sandeman*, [1901] 1 Ch. 70; [1902] 1 Ch. 579; *Stubbs* v. *Slater*, [1910] 1 Ch. 195, 632.

(*n*) 11 Eq. 265; L. R. 6 Ch. 665.

(*o*) See Money-lenders Acts, *infra*.

(*p*) L. R. 8 Ch. 484.

(*q*) L. R. 2 Ch. 542.

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August 17, 1864, in consideration of £1,000, covenanted to pay the defendant £3,300 on the death of the jointress having the jointure for £1,000 a year, and in the meantime interest at £1 per cent. per annum until her death, and after her death at the rate of £10 per cent. until the sum was paid. He also covenanted to insure his life for £3,500, and pay the premiums thereof. He further assigned his life interest by way of security for the payment of the £3,000, interest and premiums, with a provision for redemption on payment of £1,500 on August 17, 1865, or the sums of £1,850 on August 17, 1866, with all interest and premiums up to those days respectively. By a memorandum on January 5, 1865, he agreed that a debt of £400 due from him with interest at £5 per cent. per month should be tacked to the security of the indenture. The plaintiff was in urgent distress for money, and without professional advice when he contracted the loan, and his clear income from the estate afterwards was about £215. On July 1, 1865, his solicitors wrote to the defendant, offering to redeem on payment of the sum actually advanced, and interest at £5 per cent., and on not receiving any answer filed a bill to redeem on those terms. Romilly, M.R., treating the transaction as the sale, *pro tanto*, of a reversion on the death of the jointress at an inadequate value, was of opinion that the mortgage and assignment made to secure it must be cancelled, and the property reconveyed on payment of the principal sum advanced, together with interest at £5 per cent. per annum from the date of the advance, but refused to give any relief as to the £400. Chelmsford, C., on appeal reversed the order of the M.R., made a decree for redemption on payment of £1,500, with interest at £1 per cent. on the sum of £3,300 down to August 17, 1865, and afterwards on £1,500 at £5 per cent., and of the sums paid by the defendant for premiums with interest thereon and of the sum of £400 and interest thereon at the rate of £5 per cent. per month. His Lordship said that if it had been the case of the sale of a reversion he should have had no difficulty in determining that there was sufficient evidence adduced by the plaintiff of the inadequacy of price, and the onus would have been upon the defendant to prove that the transaction was reasonable. But his Lordship was at a loss to discover what reversion there was in the plaintiff, for which the parties could be said to have dealt, that the policy of law which throws its protection round all reversioners, might be questionable, and had been questioned, and that the principle ought not to be extended by analogy.

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This decision was strongly disapproved of by Stuart, V.-C., in *Tyler* v. *Yates* (*r*).

"*Merely on the ground of undervalue.*"—Whether the estate sold be in possession or in reversion, the inadequacy of consideration may be so great as of itself to furnish evidence of fraud (*s*), and so where the price is grossly inadequate, notwithstanding the Act, the old rule applies with full force to the purchase of a reversionary interest (*t*). Undervalue is, therefore, still a material element in cases in which it is not the sole ground of relief (*u*), and it may be the sole ground for relief when the inadequacy is so great as of itself to amount to evidence of fraud (*x*).

But in determining whether the contract is a hard one, the point to be considered is, not so much the *quantum* of the consideration as the fairness of the transaction generally (*y*). In cases where the onus lies on the purchaser of showing that there was nothing unconscientious on his part, if he succeeds in doing so and the bargain appears to have been made *bona fide*, and without fraud or unfair dealing, then, although the price is in fact inadequate, the transaction will not be set aside : *O'Rorke* v. *Bolingbroke* (*z*). In this case Lord Hatherley, agreeing with the Court below, thought the whole case ought to be opened upon the ground that the expectant, although the defendant had suggested his employment of a solicitor, had not on account of his poverty employed one, whereas if he had done so, the solicitor would probably have pointed out the very bad health of the defendant's father, upon whose death shortly afterwards the reversion fell into possession, and would have either obtained a better price for the sale of the reversion or have suggested a loan in lieu thereof. But the majority of the Court took the view that although the price was inadequate, and although there was no independent advice, yet the particular circumstances of the case sufficiently explained these suspicious circumstances, and that the purchaser had discharged the onus thrown upon him by showing that the transaction was a fair one.

(*r*) 11 Eq., at p. 276; *Helsham* v. *Barnett*, 21 W. R. 309; *Howley* v. *Cook*, 8 Ir. R. Eq. 570.

(*s*) See *Brenchley* v. *Higgins*, 70 L. J. Ch. 788, especially judgment of Romer, L.J.

(*t*) See *Fry* v. *Lane*, 40 Ch. D. 312, 322.

(*u*) *Earl of Aylesford* v. *Morris*, L. R. 8 Ch., at p. 491.

(*x*) See judgment of Lord Thurlow, *Gwynne* v. *Heaton*, 1 Bro. Ch. 8, and see *Brenchley* v. *Higgins*, 70 L. J. Ch 788.

(*y*) *Middleton* v. *Brown*, 47 L. J. Ch. 411; *O'Rorke* v. *Bolingbroke*, *infra* note (*z*).

(*z*) 2 A. C. 814.

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5. Money-lenders Acts, 1900—1927.

By section 1 of the Act of 1900 it is enacted, in effect, that—

1.—(1) Where proceedings are taken in any Court by a money-lender for the recovery of any money lent after the commencement of this Act, or the enforcement of any agreement or security made or taken after the commencement of this Act in respect of money lent either before or after the commencement of this Act, and there is evidence which satisfies the Court that the interest charged in respect of the sum actually lent is excessive, or that the amounts charged for expenses, inquiries, fines, bonus, premium, renewals, or any other charges, are excessive, and that, in either case, the transaction is harsh and unconscionable, or is otherwise such that a Court of equity would give relief, the Court may re-open the transaction, and take an account between the money-lender and the person sued, and may, notwithstanding any statement or settlement of account or any agreement purporting to close previous dealings and create a new obligation, re-open any account already taken between them, and relieve the person sued from payment of any sum in excess of the sum adjudged by the Court to be fairly due in respect of such principal, interest and charges, as the Court, having regard to the risk and all the circumstances, may adjudge to be reasonable; and if any such excess has been paid, or allowed in account, by the debtor, may order the creditor to repay it; and may set aside, either wholly or in part, or revise, or alter, any security given or agreement made in respect of money lent by the money-lender, and if the money-lender has parted with the security may order him to indemnify the borrower or other person sued.

(2) Any Court in which proceedings might be taken for the recovery of money lent by a money-lender shall have and may at the instance of the borrower or surety or other person liable, exercise the like powers as may be exercised under this section, where proceedings are taken for the recovery of money lent, and the Court shall have power, notwithstanding any provision or agreement to the contrary, to entertain any application under this Act by the borrower or surety, or other person liable, notwithstanding that the time for repayment of the loan, or any instalment thereof, may not have arrived.

(3) On any application relating to the admission or amount of a proof by a money-lender in any bankruptcy proceedings, the Court

may exercise the like powers as may be exercised under this section when proceedings are taken for the recovery of money.

(4) The foregoing provisions of this section shall apply to any transaction which, whatever, its form may be, is substantially one of money-lending by a money-lender.

(5) Nothing in the foregoing provisions of this section shall affect the rights of any *bona fide* assignee or holder for value without notice.

(6) Nothing in this section shall be construed as derogating from the existing powers or jurisdiction of any Court.

(7) In the application of this Act to Scotland this section shall be read as if the words "or is otherwise such that a Court of equity would give relief" were omitted therefrom.

Scope of the Act.—The Act which deals only with contracts made with money-lenders (*a*) makes as to such contracts a new departure in principle. "Although the Court of Chancery from the earliest times was familiar with questions more or less analogous, it never assumed to deal with them on the principle on which this Act grants relief. In certain cases which, in modern times at any rate, have been confined to dealings with expectant heirs, including the whole class of persons for convenience sake comprehended under that designation, the Court of Chancery gave relief on terms. On the plaintiff submitting to do equity by repaying what was justly due, the Court set aside the transaction which it considered unrighteous, and ordered that the securities impeached should stand as a security for the money actually advanced with interest. But the Court never remodelled the bargain. 'The Chancery' as a great Judge said many years ago, 'mends no man's bargains' (*b*). So the Act involves a new departure in principle, and the working of the machinery is entrusted to hands rougher it may be, but not less ready, and not, I think, less competent for the purpose which the Legislature had in view" (*c*).

Excessive Interest.—Where relief is claimed on the ground of excessive interest it must be shown that the excessive interest renders the bargain harsh and unconscionable, and in estimating this the Court must take into account all the circumstances including

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(*a*) As to which see definition section 6, *infra*.
(*b*) Lord Nottingham in *Maynard* v. *Moseley*, 3 Sw. 655.
(*c*) *Per* Lord Macnaghten, *Samuel* v. *Newbold*, [1906] A. C., at p. 468.

the element of risk (*d*). Under certain circumstances 75 per cent. per annum may not be excessive (*e*).

Harsh and Unconscionable, or is otherwise such that a Court of Equity would give Relief.—It was held in *Wilton* v. *Osborn* (*f*) that the words "or otherwise is such that a Court of Equity would give relief" were not exclusive of the words "harsh and unconscionable," and that in order to entitle the person sued to relief the transaction must be such that a Court of equity would relieve against it on the ground of its being harsh and unconscionable. Consequently unless the borrower was one of the class known as expectant heirs relief would not be granted to him (if of full capacity) merely on the ground of excessive interest or exorbitant charges unless it could be shown that he had been overreached, tricked, or deceived, and that the money-lender had taken an undue advantage of his weakness and necessities. This decision was, however, overruled by the Court of Appeal (*g*) and the House of Lords has since held that the relief afforded by the Act is not limited to cases in which before the Act the Court of Chancery would have given relief (*h*). The policy of the Act is to prevent oppression, leaving it to the discretion of the Court to weigh each case upon its own merits and to look behind a class of contracts which peculiarly lend themselves to an abuse of power (*i*).

May Re-open any Account.—The Court has power when re-opening an existing money-lending transaction, to re-open also one that is past and closed provided it is relevant to or in some way connected with the existing transaction (*k*), but it cannot re-open a transaction entirely unconnected with the transaction, the subject-matter of the action, and as to which no case is raised by the borrower by counterclaim or otherwise (*l*).

(*d*) *Wells* v. *Allott*, [1904] 2 K. B. 843; *Poncione* v. *Higgins*, 21 T. L. R. 11; *Claskie* v. *Griffin*, 111 L. T. 712; *Salaman* v. *Blair*, *ibid.* 426; *Hart* v. *Hungerford*, 114 L. T. 663.

(*e*) *Carringtons*, *Ltd.* v. *Smith*, [1906] 1 K. B. 79; see, however, *Part* v. *Bond*, 93 L. T. 49; 94 L. T. 390; and see also section 10, sub-section 1, of the Act of 1927, *infra*.

(*f*) [1901] 2 K. B. 110.

(*g*) *Re a Debtor*, [1903] 1 K. B. 705.

(*h*) *Samuel* v. *Newbold*, [1906] A. C. 461; and see section 10 of the Act of 1927, *infra*.

(*i*) *Ibid.* As to the words "harsh and unconscionable," see *Part* v. *Bond*, 93 L. T. 49; *Levere* v. *Greenwood*, 20 T. L. R. 389; *Wells* v. *Joyce*, [1905] 2 I. R. 134; *Abrahams* v. *Dimmock*, [1915] 1 K. B. 662; *Halsey* v. *Wolfe*, [1915] 2 Ch. 330; *Kruse* v. *Seeley*, [1924] 1 Ch. 136; see also section 10, sub-section 1, of the Act of 1927, *infra*.

(*k*) *Saunders* v. *Newbold*, [1905] 1 Ch. 260.

(*l*) *Ibid.* And see *Lewis* v. *Mills*, 30 T. L. R. 438; *Wolfe* v. *Lowther*, 31 T. L. R. 354; *Kerman* v. *Wainwright*, 32 T. L. R. 295.

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Sum Adjudged to be fairly Due in respect of . . . Interest.—In adjudging the amount fairly due (*m*) in respect of interest the Court has to take into account all the factors of the particular case including the element of risk, and the amount due for interest must therefore vary with the circumstances (*n*). There is no fixed rule as to what is fair interest in any circumstances, and having regard to the fact that 75 per cent. per annum has been held to be fair interest under circumstances of great risk to the lender (*o*) the limits of possible variation are very wide (*p*).

Application Relating to the Admission or Amount of Proof (*q*).—The jurisdiction of the Court under section 1 (3) only arises where there is a proof by the money-lender actually before the Court. Therefore where the money-lender has withdrawn his proof under circumstances in which he can properly do so the Court cannot entertain an application to take an account of dealings between the money-lender and the bankrupt (*r*).

Section 2 of the Act of 1900, which provided for the registration of money-lenders, and for the carrying on of business in the registered name, etc., has been repealed, and by section 1 of the Act of 1927 it is provided that every money-lender shall take out annually a licence. Such licence is to be taken out in the money-lender's true name, and is also to show the money-lender's authorised name and address. By s. 2 of the Act of 1927 a licence can only be granted to a person who holds a certificate. Certificates under the section are to be granted by a petty sessional Court, and a certificate is not to authorise a money-lender to carry on business at more than one address or in more than one name, or under any name which implies that he carries on banking business.

Section 2, sub-section 6, provides that a certificate shall not

(*m*) Where in a moneylender's action the defendant admits that he owes part of the money advanced, summary judgment will be given for the amount admitted to be due without interest, and leave given to defend as to the balance : *Lazarus* v. *Smith*, [1908] 2 K. B. 266.

(*n*) *Abrahams* v. *Dimmock*, *supra*; *Glaskie* v. *Griffin*, *supra*; *Salaman* v. *Flair*, *supra*.

(*o*) *Carringtons*, *Ltd.* v. *Smith*, [1906] 1 K. B. 79.

(*p*) The following rates of interest have been allowed in various cases : 5 per cent. *Poncione* v. *Higgins*, 21 T. L. R. 11; 10 per cent. *Part* v. *Bond*, 93 L. T. 49; *Saunders* v. *Newbold*, [1905] 1 Ch. 260; 20 per cent. *Carringtons*, *Ltd.* v. *Valerie*, May 16, 1905, unreported, but see Matthews' Law of Money-lending, 1906, p. 46; *Samuel* v. *Bell*, 22 T. L. R. 118.

(*q*) Sub-section 3, *supra*. See *Re a Debtor*, [1917] 2 K. B. 60; *Re Mackenzie*, *ibid.* 728.

(*r*) *Re Attree*, [1907] 2 K. B. 868.

be refused except on one of the grounds therein mentioned; and by sub-section 7 any person aggrieved by the refusal of a petty sessional Court to grant a certificate, may appeal to a Court of quarter sessions. By section 3, where a money-lender is convicted of (*inter alia*) an offence under the Act of 1900, his certificate may be suspended or forfeited. Section 5 contains useful provisions forbidding the issuing of circulars or advertisements inviting anyone to enter into a money-lending transaction, or the employment by a money-lender of agents to tout for business. An agreement to repay money lent by a money-lender must be signed by the borrower and must contain the particulars therein mentioned (section 6); and, subject as therein mentioned, compound interest cannot be charged (section 7).

Section 8 of the new Act contains an important provision making it obligatory upon the money-lender, on demand by the borrower and on payment of 1s., to supply a statement showing the date and amount of the loan, the rate per cent. charged, and the sums already paid to the money-lender in respect of the same, etc. And the money-lender is also to supply, on demand by the borrower and on tender of a reasonable sum for expenses, a copy of any document relating to the loan. Certain restrictions are imposed upon a money-lender by section 9 in the event of bankruptcy proceedings.

Section 10 of the Act of 1927 contains a new and important provision under which, where in any proceedings in respect of money lent by a money-lender after the commencement of the Act, or in respect of any agreement or security made or taken after the commencement of the Act in respect of money lent either before or after the commencement of the Act, it is found that the interest charged exceeds the rate of 48 per cent. per annum, the Court shall, unless the contrary is proved, presume for the purposes of section 1 of the Money-lenders Act, 1900, that the interest charged is excessive and the transaction harsh and unconscionable. The powers of the Court under section 1, sub-section 2, of the Act of 1900 as to reopening transactions (although no proceedings are taken for the recovery of money lent and the time for repayment has not arrived) may, in the event of the borrower's bankruptcy, be exercised by the trustee in bankruptcy.

Section 12 makes illegal any agreement between a money-lender and a borrower for the payment by the borrower of any sum on account of costs, charges or expenses relating to the negotiations

for or the granting of a loan or proposed loan. Under section 13 (except and subject as therein mentioned) no proceedings will lie for the recovery by a money-lender of money lent after the commencement of the Act, or for the enforcement of any security taken after the commencement of the Act, unless the proceedings are commenced before the expiration of twelve months after the cause of action accrued.

Section 14 contains special provisions relating to pawnbrokers' loans. Under section 17, subject as therein provided, the Act is to continue to apply as to any debt to a money-lender in respect of money lent after the commencement of the Act notwithstanding that the debt has been assigned, and (except where the context otherwise requires) references in the Act to a money-lender are to be construed as including any such assignee.

Section 6 of the Act of 1900 provides that the expression "money-lender" shall include every person whose business is that of money-lending, or who advertises or announces himself or holds himself out in any way as carrying on that business; but shall not include :—

(a) any pawnbroker in respect of business carried on by him in accordance with the provisions of the Acts for the time being in force in relation to pawnbrokers; or

(b) any registered society within the meaning of the Friendly Societies Act, 1896, or any society registered or having rules certified under sections two or four of that Act, or under the Benefit Building Societies Act, 1836, or the Loan Societies Act, 1840, or under the Building Societies Acts, 1874 to 1894; or

(c) any body corporate, incorporated or empowered by a special Act of Parliament to lend money in accordance with such special Act; or

(d) any person *bona fide* carrying on the business of banking or insurance or *bona fide* carrying on any business not having for its primary object the lending of money, in the course of which and for the purposes whereof he lends money; or

(e) any body corporate for the time being exempted from registration under this Act by order of the Board of Trade made and published pursuant to regulations of the Board of Trade.

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The section limits the application of the Act to persons whose main business is that of money-lending (*y*). "The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by way of friendship. This particular Act was supposed to be required to save the foolish from the extortion of a certain class of the community who are called money-lenders as an offensive term" (*z*). So where an art dealer took from his customers bills in payment of the amounts they owed him and renewed and discounted such bills from time to time and also assisted two art businesses and some old friends by loans of money and discounting bills, but did not advertise himself as a money-lender and did not discount bills for any outsiders it was held that he was not a money-lender within the Act (*a*).

It is to be observed that under section 10, sub-section 3, of the Act of 1927, the above sub-clause (*a*) of section 6 of the Act of 1900 does not apply to cases where there is a special contract made in accordance with the provisions of section 24 of the Pawnbrokers Act, 1872.

6. As to the terms upon which an Unconscionable Bargain will be set aside.

Actions to set aside unconscionable bargains are treated as redemption actions (*b*), and relief is given upon payment of the sum actually advanced, with interest, usually at £5 per cent. (*c*), together with money expended by the defendant in lasting and valuable improvements on the premises, and costs (*d*), except the costs of an unsuccessful reference as to value (*e*).

(*y*) *Kirkwood* v. *Gadd*, [1910] A. C. 422.

(*z*) *Per* Farwell, J., *Litchfield* v. *Dreyfus*, [1906] 1 K. B., at p. 590.

(*a*) *Litchfield* v. *Dreyfus*, [1906] 1 K. B. 584; *Edgelow* v. *MacElwee*, [1918] 1 K. B. 205. (*b*) Seton (7th ed.), p. 2279.

(*c*) *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484; *Tyler* v. *Yates*, L. R. 6 Ch. 665; *Miller* v. *Cook*, 10 Eq. 641; *Fry* v. *Lane*, 40 Ch. D., at p. 325; *James* v. *Kerr*, 40 Ch. D., at p. 461; *Rae* v. *Joyce*, 29 L. R. Ir. 500; as to non-allowance of compound interest, see *Gowland* v. *De Faria*, 17 V. 20; see Money-lenders Act, 1900, s. 1, and Money-lenders Act, 1927, s. 7.

(*d*) *Murray* v. *Palmer*, 2 Sch. & L. 490; *Salter* v. *Bradshaw*, 26 B. 161; *Twistleton* v. *Griffith*, 1 P. W. 310; *Gwynne* v. *Heaton*, 1 Bro. Ch. 1; *Peacock* v. *Evans*, 16 V. 512; *Wharton* v. *May*, 5 V. 27; *Curling* v. *Townshend*, 19 V. 633; *Bowes* v. *Heaps*, 3 V. & B. 117; *Evans* v. *Cheshire*, Belt's Suppl. to V. 312; *Fox* v. *Wright*, 6 Madd. 111; *Bawtree* v. *Watson*, 3 My. & K. 341; *Miller* v. *Cook*, 10 Eq. 641.

(*e*) *Boothby* v. *B.*, 15 B. 212, 214; *Edwards* v. *Burt*, 2 De G. M. & G. 55, 65; *Jones* v. *Ricketts*, 31 B. 130.

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In *James* v. *Kerr* (*f*) the mortgagee was disallowed a bonus, which the mortgagor had covenanted to pay, as being a collateral advantage (*g*). In *Pennell* v. *Millar* (*h*) a mortgagee was disallowed what he had paid for premiums on life policies (*i*).

And in default of payment of principal and interest and costs, if allowed to the defendant, the action will be dismissed with costs (*k*).

Misconduct on the part of the defendant has been held to disentitle him to costs (*l*); so, where he has refused proper terms before the suit was instituted, he has been compelled to pay the costs of litigation which he rendered necessary (*m*).

If no moral fraud has been proved, and the charges of misconduct go further than the evidence warrants, no costs will be given (*n*), or the plaintiff may be ordered to pay the costs (*o*). Sometimes where the ground of relief was undervalue only, the plaintiff has obtained relief only on payment of costs (*p*). On the other hand, the purchaser will be charged with what he has actually received and interest, but it seems he will not, like a mortgagee, be charged with what without wilful default he might have received (*q*). As to the terms on which relief was given as against a sub-purchaser with notice, see *Addis* v. *Campbell* (*r*).

Accounts settled for the purpose of advances on *post-obit* bonds, or mortgages of reversionary interests, will not be treated as settled accounts (*s*).

(*f*) 40 Ch. D. 449, and see *Rees* v. *De Bernardy*, [1896] 2 Ch. 457; *Fairclough* v. *Swan Brewery Co.*, [1912] A. C. 565.

(*g*) And see *Mainland* v. *Upjohn*, 41 Ch. D. 126.

(*h*) 23 B. 172.

(*i*) And see *Bromley* v. *Smith*, 26 B. 644; *Fry* v. *Lane*, 40 Ch. D., at p. 325: *Darcy* v. *Croft*, 9 Ir. Ch. R. 19; and cf. *Re Leslie*, 23 Ch. D. 552; explained *Re Winchelsea's Policy Trusts*, 39 Ch. D. 168; Seton (7th ed.), p. 2276, Form 3.

(*k*) *Croft* v. *Graham*, 2 De G. J. & S. 155; Seton, at p. 2275, Form 1; *Benyon* v. *Fitch*, 35 B. 570, 578; *Earl of Aylesford* v. *Morris*, L. R. 8 Ch. 484, 498; Seton, at p. 2276, Form 3.

(*l*) *Howley* v. *Cook*, 8 Ir. R. Eq. 570; *Baugh* v. *Price*, 1 Wils. 320; *Gowland* v. *De Faria*, 17 V. 20; *Moroney* v. *O'Dea*, 1 Ball & B. 109, and the reporter's note; *Wood* v. *Abrey*, 3 Madd. 417; *Bawtree* v. *Watson*, 3 My. & K. 339; *Tyler* v. *Yates*, 11 Eq. 265, 277.

(*m*) *Benyon* v. *Fitch*, 35 B. 570, 578; *Benyon* v. *Cook*, L. R. 10 Ch. 389; *Nevill* v. *Snelling*, 15 Ch. D. 679; *Wyatt* v. *Cook*, 16 W. R. 502.

(*n*) *Fry* v. *Lane*, 40 Ch. D., at p. 324.

(*o*) *St. Albyn* v. *Harding*, 27 B. 11; but see *Tyler* v. *Yates*, 11 Eq. 265; *O'Rorke* v. *Bolingbroke*, 2 A. C. 814.

(*p*) *Twistleton* v. *Griffith*, 1 P. W. 310; *Bawtree* v. *Watson*, 3 My. & K., at p. 341; *Bromley* v. *Smith*, 26 B. 644; Dart, V. & P. (7th ed.) (1905), ii, p. 759.

(*q*) *Murray* v. *Palmer*, 2 Sch. & L. 489; but see the decree, *ibid.*, *contra*, 490; *Re Slater's Trusts*, 11 Ch. D. 227.

(*r*) 4 B. 401; Seton (7th ed.), p. 2279.

(*s*) *Croft* v. *Graham*, 5 Giff. 1; *Tottenham* v. *Green*, 32 L. J. Ch. 201; Seton,

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7. Confirmation and Acquiescence.

Impeachable transactions may be rendered valid by acts of confirmation (*t*), especially when of a formal character after advice taken (*u*), as by will or deed (*x*), or acquiescence for a great length of time (*y*) on the part of a person who is cognisant of his right to relief (*z*) for it has been well said, "that the presumption which a Court of justice most properly entertains against stale demands (*a*) can never be more properly applied than in a case where the burden of proof upon a most material point in controversy is thrown upon the defendant" (*b*).

But confirmation or acquiescence must be founded on full knowledge of the facts, and must be in relation to a transaction to which effect may be given thereby (*c*), and it will be of no avail whilst the plaintiff continues in the same situation as when he entered into the contract, for in such cases it has always been presumed, that the same distress, which pressed him to enter into the contract, prevented him from coming to set it aside; it is only when he is relieved from that distress that he can be expected to resist the performance of the contract (*d*); and in *Curwyn* v. *Milner* (*e*) relief was given even after payment of the money due on a *post-obit* bond, the payment having been made from fear of an execution.

In *Rae* v. *Joyce* (*f*) a mortgage by a married woman was held

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at p. 2278. As to deductions for commission and bonus, see *Mainland* v. *Upjohn* 41 Ch. D. 126; *The Benwell Tower*, 72 L. T., at p. 670. Cf. *Cheese* v. *Keen*, [1908] 1 Ch. 245; see also sections 7 and 12 of Money-lenders Act, 1927.

(*t*) *Cole* v. *Gibbons*, 3 P. W. 290.

(*u*) *Lyddon* v. *Moss*, 4 De G. & J. 104.

(*x*) *Stump* v. *Gaby*, 2 De G. M. & G. 623.

(*y*) *Sibbering* v. *Earl of Balcarras*, 3 De G. & Sm. 735; *Addis* v. *Campbell*, 4 B. 401; *Lord* v. *Jeffkins*, 35 B. 7; *Turner* v. *Collins*, L. R. 7 Ch. 329; Kerr on Fraud (5th ed.), p. 351, 7.

(*z*) See *supra*, p. 245, and *Gerrard* v. *O'Reilly*, 3 Dr. & Wa. 414; *Rees* v. *De Bernardy*, [1896] 2 Ch. 437; Kerr, at p. 354.

(*a*) See *Salter* v. *Bradshaw*, 26 B. 161, and the judgment of Lindley, L.J., in *Allcard* v. *Skinner*, 36 Ch. D., at p. 186.

(*b*) *Sibbering* v. *Earl of Balcarras*, 3 De G. & Sm. 737.

(*c*) *La Banque Jacques-Cartier* v. *La Banque d'Epargne*, *etc.*, 13 A. C. 111; *Lyddon* v. *Moss*, 4 De G. & J. 104.

(*d*) *Gowland* v. *De Faria*, 17 V. 20, cited with approval by Kay, J., in *Fry* v. *Lane*, 40 Ch. D., at p. 324; *Ray* v. *Joyce*, 29 L. R. Ir. 500; *Medlicott* v. *O'Donel*, 1 Ball & B. 156; *Kendall* v. *Beckett*, 2 Russ. & M. 88; *Edwards* v. *Browne*, 2 Coll. Ch. R. 100; *Kempson* v. *Ashbee*, L. R. 10 Ch. 15; *Beynon* v. *Cook*, L. R. 10 Ch. 391 (n.); Kerr, at pp. 353, 367. See *Huguenin* v. *Baseley*, *supra*; *Fox* v. *Mackreth*, *post*, Vol. 2, and note.

(*e*) 3 P. W. 292 (n.).

(*f*) 29 L. R. Ir. 500.

a hard and unconscionable bargain, although the deed was approved by her solicitor, and was duly acknowledged.

So, where a person bought a reversion at a gross undervalue, from an heir in distressed circumstances, and resold it at a large profit to a sub-purchaser who had full notice of the original fraud, and the reversioner, being still in distress, was induced by the original purchaser to join in and confirm the re-sale, and to concur in suffering recoveries which were necessary to perfect the title, but nothing was paid or secured to him as a consideration for such concurrence, the transaction was set aside as against the sub-purchaser on the repayment of the price paid on the first purchase (*g*).

Where a sale of a reversion has taken place at undervalue, time will not begin to run against the vendor until the reversion falls into possession (*h*).

Where a transaction is not merely voidable or impeachable, but is absolutely void, upon principles of public policy, then as is laid down by Lord Hardwicke in the principal case, it is incapable of confirmation. Thus, a usurious contract was, and a marriage brokage contract still is, void *ab initio*, and does not admit of confirmation (*i*).

Infants' Relief Act, 1874 (*k*), enacts—

Section 1. "All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessaries) and all accounts stated with infants, shall be absolutely void; provided always that this enactment shall not invalidate any contract into which an infant may, by any existing or future statute, or by the rules of common law or equity enter, except such as now by law are voidable."

Section 2. "No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there

(*g*) *Addis* v. *Campbell*, 4 B. 401; and see *King* v. *Savery*, 1 Sm. & G. 271; 5 H. L. Cas. 627; *Wright* v. *Vanderplank*, 2 K. & J. 1.

(*h*) *Salter* v. *Bradshaw*, 26 B. 161. See also *Beynon* v. *Cook*, L. R. 10 Ch. 389; *Allcard* v. *Skinner*, 36 Ch. D., at p. 186.

(*i*) *Shirley* v. *Martin*, 3 P. W. 74 (n.); *Cole* v. *Gibson*, 1 Ves. Sen. 506, 507.

(*k*) 37 & 38 Vict. c. 62.

shall or shall not be any new consideration for such promise or ratification after full age " (*l*).

(*l*) See *Ex p. Kibble*, L. R. 10 Ch. 373; *Ex p. Jones*, 18 Ch. D. 109; *Coxhead* v. *Mullis*, 3 C. P. D. 439; *Northcote* v. *Doughty*, 4 C. P. D. 385; *Ditcham* v. *Worrall*, 5 C. P. D. 410; *Brown* v. *Harker*, 68 L .T. 488; *Holmes* v. *Brierley*, 59 L. T. 70; *Valentini* v. *Canali*, 24 Q. B. D. 166; *Hamilton* v. *Vaughan-Sherrin*, 10 T. L. R. 642; *Smith* v. *King*, [1892] 2 Q. B. 543; *Edwards* v. *Carter*, [1893] A. C. 360; *Re A. and M.*, [1926] 1 Ch. 274.

CONVERSION (*a*).

FLETCHER *v.* ASHBURNER.

June, 1779. 1 Bro. Ch. 497.

Conversion.

Where a real estate is ordered to be sold, it becomes personalty, and shall go accordingly.

JOHN FLETCHER, by his will devised his burgage houses and free rents in Kendal, and all his personal estate, to trustees and the survivor, and the heirs, executors, and administrators, of such survivor, in trust to sell so much as should be sufficient to pay his debts, and then to permit his wife Agnes to enjoy the residue during her life, if she so long continued his chaste widow, and after her decease, to sell and dispose thereof, and the money arising thereby, after deducting charges, and half-a-guinea each to the trustees for their trouble, to pay to and between his son William and daughter Mary, share and share alike; provided, that if his wife should happen to marry again, the trustees should, immediately after the marriage, sell all the estate and effects given to her for her life, and, after such deductions as aforesaid, should pay the remainder of the money to and amongst his wife, his son William, and daughter Mary, share and share alike equally; and in case either his son William or his daughter Mary should die before his or their legacy should become due, that the share or legacy of him or her so dying should go to the survivor of them.

The testator died, leaving Agnes his widow, William his only son and heir-at-law, and Mary his daughter.

Agnes, by the custom of burgage tenure, was entitled to

(*a*) The importance of this case has been much reduced by recent legislation; see *post*, p. 301.

hold the burgage houses in Kendal during her chaste viduity, against the disposition of her husband by will.

Mary attained twenty-one, but died unmarried, in the life of her mother and brother. William was twenty-one at the death of the testator, and died without issue, in the life of his mother; the mother died the widow of the testator.

Upon her death a bill was filed by the heir-at-law of William, and John the testator, against the trustees and the personal representatives of the testator and of the widow, to have a conveyance of the real estates devised by the will to the plaintiff, the heir-at-law.

The representative of the widow, who was the sole next-of-kin of William, the son, by answer claimed the property as personal; alleging, that, by the direction to the trustees to sell the real estates, they became as personal property, and, as such, were to go to the personal representative of William, the son, who survived his sister.

Mr. Madocks and Mr. Wilson argued that the real estates devised by the will were still to be considered as real estates, and to go to the real, not the personal, representative; that it was clearly the intention of the testator that the estate should remain, and, whilst it did so, was to be enjoyed by one person; that he directed it to be sold merely for the purpose of a division; that, in consequence of the death of the daughter no division was to be made, and therefore the reason for the direction ceased; and, from thenceforth, the son alone becoming entitled, upon the death of his mother, it was to be considered as land. They relied upon the case of *Flanagan* v. *F.*, June 8, 1768, before Lord Camden, which was a devise of real and personal estate to trustees in trust, out of the personal estate, and by sale of a sufficient part of the real, to pay debts; the surplus, after payment of debts, to A. A suit was instituted for payment of the debts, and the real estates decreed to be sold; part was sold; and afterwards A died leaving a son and daughter; the cause was revived against the son; and it being apprehended that sufficient was not sold to pay the debts a further part of the real estate was sold under the order of the

Court. It was afterwards proved that the money produced by the first sale was sufficient to pay the debts; the question was, whether the heir or the personal representative was entitled to this money. It was alleged by Mr. Wilson, who cited the case, that Lord Camden's determination was, that whatever quality the fund then had, such it should retain; and he decreed for the personal representative. The other cases mentioned were *Cruse* v. *Barley* (*b*) and *Digby* v. *Legard* (*c*).

Mr. Kenyon and Mr. Chambre (on behalf of the defendants, the executors of the widow) contended that the testator had, by his will, directed the real estate, after the death of his widow, to be sold, and blended with his personal estate, and the whole to be divided between his children, or in case either of them should die in the life of his wife, to the survivor. Upon the case of *Flanagan* v. *F.* it was observed that the Court determined the produce of the real estate to be considered as personal, because the Court had itself directed the sale to be made and the property to be changed for payment of debts. The cases of *Digby* v. *Legard* and *Cruse* v. *Barley* were treated as inapplicable to the present case, being cases of lapsed devises: *Durour* v. *Motteux* and *Mallabar* v. *M.* were cited, as decisive of the question in favour of the defendants.

Sir Thomas Sewell, M.R., in June, gave his opinion. He observed, that nothing was better established than this principle: that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement, or otherwise; and whether the money is actually deposited, or only covenanted to be paid, whether the land is actually conveyed, or only agreed to be conveyed, the owner of the fund, or the contracting parties, may make land money or money land. The cases established this rule universally.

(*b*) 3 P. W. 20.

(*c*) 3 P. W. 22.

If any difficulty has arisen, it has arisen from special circumstances. In the case of *Sweetapple* v. *Bindon* (*d*), it was determined that a husband was entitled to money to be laid out in land, as tenant by the curtesy: and although it is held that a wife is not entitled to dower in a similar case, yet it is allowed that it is so held, because cases have been determined, and not from any principle.

The cases of land to be turned into money are fewer than those of money to be employed in the purchase of land.

The principal cases have been where real estates have been directed to be sold, and some part of the disposition has failed; so that something has resulted to the heir-at-law, as in the cases of *Emblyn* v. *Freeman* and *Cruse* v. *Barley*. These are all cases where a devise has failed, and the thing devised has not accrued to the representative or devisee, but to the heir-at-law of the testator.

The case of *Durour* v. *Motteux* is a strong case to the point now before the Court; and, if anything could strengthen the general rule, the circumstances of the present case would do so. The testator has blended the real and personal estate together, and disposed of them without distinction, for the benefit of his wife and children. Both real and personal estate are made one fund. In the case of *Durour* v. *Motteux*, Lord Hardwicke made this a principal ground for considering the whole fund as personal estate; in the present case it might be uncertain, till the death of the widow, whether the estates must not be absolutely sold; both the children, indeed, died before her; but she might have married before the death of one or both. The interests of both the children were vested, subject, as to one of them, to be defeated in case either of them died before the mother.

There could be no election to take the fund as land or money; for, where an estate is directed to be sold, and the money divided amongst several persons, none has a right to say that any part shall not be sold (*e*); the question, therefore, is merely between

(*d*) 2 Vern. 536.

(*e*) See also *Deeth* v. *Hale*, 2 Moll. 317; *Smith* v. *Claxton*, 4 Madd. 493; *Chalmer* v. *Bradley*, 1 J. & W. 59; *Trower* v. *Knightley*, 6 Madd. 134.

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the real and personal representatives of the son, whether the personal representative shall take the fund as personal property, according to the will, or the heir-at-law shall take it, as if no will had been made.

The case of *Flanagan* v. *F.* (*f*) is a strong authority that it shall be taken as personal estate, according to the will. In that case the testatrix, Sarah Wooley, by will, dated March 28, 1749, gave and devised all her real and personal estates to Francis Plumtree, in trust, in the first place, out of her personal estate, as far as it would extend, and, in the next place, by sale of her real estate, or a sufficient part thereof, to raise so much money as should be sufficient to pay her debts and legacies; and, after payment thereof, in trust to convey the residue of the real estate which should remain unsold, and pay the produce of such part as should be sold, and all other the residue of her real estates, between her father, James Flanagan, and her brother, James Flanagan, their heirs, executors, and administrators, equally. A bill was brought by the creditors for sale of the real estate, to supply the deficiency of the personal estate, for payment of debts, and a decree was made for a sale; and if any of the money to arise by the sale should remain after payment of the debts and legacies, it was directed to be paid to James Flanagan, the father, and James Flanagan, the son, equally; and if any estate should remain unsold, the trustees were directed to convey it to them and their heirs, equally; after the decree, James Flanagan, the son, died leaving a daughter, and a son, born after his death; part of the estate was sold, and afterwards, James Flanagan, the grandfather, died, leaving his grandson his heir, and his grandson and granddaughter his sole next-of-kin; after the death of the grandfather, a further part of the estate was sold, under an apprehension that the produce of the first sale was insufficient to pay the debts and legacies: it appeared, however, that the produce of the first sale was sufficient. A bill was afterwards brought by the son of James Flanagan, the son, claiming a moiety of the surplus,

(*f*) 1 Bro. Ch. 500, cited and explained by Mr. Scott *arguendo* in *Ackroyd* v. *Smithson*. Approved also by Jessel, M.R., in *Steed* v. *Preece*, 18 Eq. 196; and see *Burgess* v. *Booth* [1908] 2 Ch. 648.

as the real estate of James Flanagan, his grandfather, to whom he was become heir, against the personal representative of his grandfather, and against the daughter of James Flanagan, the son, who claimed a moiety as one of the next-of-kin of her grandfather. It was objected, that the second sale, after the death of the grandfather, was improper. The Court determined that the second sale, *actually made under the decree of the Court*, before the Master, could not be considered as improperly made; that there was no fraud, no practice, and that the money ought to go to the personal representative of the grandfather. The case of *Digby* v. *Legard* is a different question. There the testatrix (Elizabeth Byerley) directed her real estates to be sold to pay debts and legacies, and gave the residue to five persons, to be equally divided between them, one of whom (Lady Cayley) died in her lifetime. It was resolved that the devise, so far, failed totally, and should accrue to the heir-at-law. The language of the decree is such, that the benefit of the devise to Lady Cayley should accrue to the testatrix's heir-at-law, Mr. Jervoice, who was a lunatic, and should be paid to his committee, as real estate descended to him. The case of *Scudamore* v. *S.* shows, that in all cases where the dispute is between representatives, the heir or executor shall have the fund, according to the will or contract of the persons who gave or created it. There was a case of *Ogle* v. *Cook* (*g*), heard February 19, 1748, which was this: Mr. Ogle made his will in 1744, and gave his real estate to trustees to sell, and to vest the money in stock, and pay the interest to his wife during the widowhood, and after her death, or marriage, to his two daughters equally, except that the eldest was to have £1,000 more than the other; he gave the residue of his personal estate in the same way. He afterwards conveyed the real estate to one of the trustees named in his will, to whom he was considerably indebted, in trust to sell so much as should be necessary to pay the debt, and as to the residue, in trust for Mrs. Ogle: part of the estate was sold, and then Mr. Ogle died. His youngest daughter died in his lifetime. The bill was brought

(*g*) But see *Collins* v. *Wakeman*, 2 V. 686.

by the widow and the eldest daughter, against the son who was the heir, and the trustees, to have the residue of the estate sold, and claiming the share of the youngest daughter, as personal estate of Mr. Ogle, to be divided between them and the son as his next-of-kin. The son insisted the conveyance to the trustee was a revocation of the will; and, if not, that the share of the dead daughter was to be considered as real estate of Mr. Ogle, and descended to him as heir. It was determined that the conveyance was a revocation only *pro tanto*, to let in the debt; and that so much of the estate as remained unsold, should be sold, and that the money raised, or to be raised, by sale of the estate, made part of the personal estate of Mr. Ogle. There was another case about the same time which is in 1 Ves. Sen. 174 (*h*), where by marriage articles £500 was agreed to be laid out in purchase of lands, to be settled to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder to the wife for life, with remainder to the children of the marriage, as the husband and wife should appoint; and in default of a joint appointment, as the survivor should appoint; and in default of any appointment, to the children, to be equally divided among them; if more than one, as tenants in common, in tail general, with cross remainders; and if but one, to that child in tail general; and no appointment was made. The father and mother being dead, and the daughter being married, the trustees paid the £500 to her and her husband, and they received it as money, and executed a release. The daughter had a child, which died, and she afterwards died without issue. A daughter of the settlor, by a second marriage, filed a bill against the husband, representative of his wife, the daughter by the first marriage, for the £500, considering it as land; and it was observed, that she was entitled to the money, but that the husband of her deceased sister was entitled to the interest during his life, as tenant by the curtesy.

In the present case, William Fletcher, the son, had the whole beneficial title vested in him as money, subject to his mother's

(*h*) *Cunningham* v. *Moody.*

interest for life or widowhood. She was his sole next-of-kin, and her personal representatives are now entitled to the estate as money; the bill must, therefore, be dismissed without costs.

NOTES.

1. Generally.
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8. Conversion by the Court or third parties, p. 322.

1. Generally.

In the judgment of Sir Thomas Sewell in the principal case, the equitable doctrine of constructive conversion, which now applies to all Divisions of the High Court is thus accurately stated, *viz.*: "that money directed to be employed in the purchase of land, and land directed to be sold and turned into money, are to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction is given—whether by will, by way of contract, marriage articles, settlement, or otherwise, and whether the money is actually deposited, or only covenanted to be paid; whether the land is actually conveyed, or only agreed to be conveyed. The owner of the fund, or the contracting parties, may make land money, or money land:" (*i*).

The doctrine of conversion proceeds upon the principle, *that equity considers* "*what ought to have been done shall be taken as done*, and a rule so powerful it is as to alter the very nature of things, to make money land, and, on the contrary, turn land into money." It follows, that the neglect of trustees to perform their duty, either by converting land into money or money into land, will not affect the rights of others (*k*).

As to the effect of a direction to convert foreign lands, see *Re Piercey* (*l*), and as to conversion of land for partnership purposes, see *Lake* v. *Craddock*, Vol. II.

(*i*) *Wheldale* v. *Partridge*, 5 V. 396.
(*k*) *Lechmere* v. *Carlisle*, 3 P. W. 222; *Scudamore* v. *S.*, Pr. Ch. 543.
(*l*) [1895] 1 Ch. 83.

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The equitable doctrine of constructive or notional conversion has become of comparatively small importance owing to alterations in the law made by recent legislation. Under the Administration of Estates Act, 1925, the descent of real estate to the heir has been abolished, as have also tenancy by the curtesy, dower, and escheat (*m*). The rules of law relating to probate or letters of administration, and all powers, rights, and obligations of a personal representative in force at the commencement of the Act with respect to chattels real are to have effect with respect to the real estate vested in the personal representative (*n*). And under the Supreme Court of Judicature (Consolidation) Act, 1925, the Court has power to grant administration of real and personal estate either separately or together, and probate rules may be made for adapting to the case of real estate the procedure and practice on the grant of administration (*o*).

By section 33 of the Administration of Estates Act, 1925, on the death of a person (after the commencement of the Act) intestate as to any real or personal estate, the same is to be held by the personal representatives upon trust for sale and conversion (with the qualification therein mentioned as regards reversions, and as regards "personal chattels" as therein defined), and the net proceeds of sale and conversion and the ready money (if any) are blended into one mass, and thereout the debts, funeral and testamentary expenses are to be paid. In the case of partial intestacy, a fund is to be set apart (out of the blended fund representing real and personal estate) to provide for the pecuniary legacies (if any) left by the will. The ultimate residue, in the event of any intestacy is to be distributed—still as one blended fund—in the manner directed by section 46. See also the notes to *Ancaster* v. *Mayer*, *supra*.

Having regard to the greatly reduced importance of the doctrine in question, the notes to the principal case have been very much abbreviated. The doctrine is still material, upon occasions, in the construction of wills.

2. Conversion of Money into Land by Contract or Will.

Money agreed or directed to be laid out in land becomes land so completely as to acquire all the properties of land; thus it will be considered as real and not personal assets. Such money was subject

(*m*) Section 45. (*n*) Section 2.
(*o*) Section 155.

to tenancy by the curtesy; thus, in *Sweetapple* v. *Bindon* (*p*), where A bequeathed £300 to be laid out in land, and settled to the use of her daughter and her children, and if her daughter died without issue, to go over, the husband of the daughter was held to be tenant by the curtesy, although no purchase had been made during his wife's lifetime (*p*).

Where real estate was devised subject to a condition that the devisee should settle the hereditaments devised to him by his grandfather's will, the word " hereditaments " was held to include money in the hands of trustees subject to a trust for investment in land (*q*).

Money agreed or directed to be laid out in the purchase of land will pass under a general devise of all the lands of the person entitled to it (*r*), or by a devise of " all his lands in a particular county or elsewhere " (*s*). And money, agreed or directed to be laid out in the purchase of land, if it continue impressed with the character of land, will not pass as *money* by a general bequest to a legatee in exercise of a power or otherwise; though it will if the intention be shown, as where the gift is of so much money to be laid out in land, or " as so much money left me by the will of A " (*t*).

If money liable to be invested in land comes into the possession of a person absolutely entitled to the same, and such person leaves it in its condition as money, a notional reconversion takes place. In *Pulteney* v. *Darlington* (*u*) money impressed with the qualities of realty had come to the hands of the person (Lord Bath) solely entitled to it under the ultimate limitation in fee; and the person so entitled, without taking any notice of the particular sum, devised all his manors, etc., which he was seised or possessed of, or to which he was in anywise entitled in possession, reversion, or remainder, or which should thereafter be purchased with any trust moneys (except certain estates therein mentioned), to his brother H. in fee, and gave him all the residue of his personal estate, and made him

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(*p*) 2 Vern. 536.

(*q*) *Re Gosselin*, [1906] 1 Ch. 120.

(*r*) *Greenhill* v. *G.*, 2 Vern. 679; Pr. Ch. 320; *Guidot* v. *G.*, 3 Atk. 256; *Rashleigh* v. *Master*, 1 V. 201; *S. C.*, 3 Bro. Co. 99; *Biddulph* v. *B.*, 12 V. 161; *Green* v. *Stephens*, 17 V. 77; *Re Scarth*, 10 Ch. D. 499.

(*s*) *Lingen* v. *Sowray*, 1 P. W. 172. Cf. *Re Cleveland's S. E.*, [1893] 3 Ch. 244.

(*t*) *Cross* v. *Addenbrook*, 3 P. W. 222, (n.); *Edwards* v. *Warwick*, 2 P. W. 171; *Gillies* v. *Longlands*, 4 De G. & Sm. 372; *Chandler* v. *Pocock*, 15 Ch. D. 491; 16 Ch. D. 648; *Re Kingston*, 5 L. R. Ir. 169; *Cookson* v. *C.*, 12 Cl. & Fin. 121; *Re Greaves*, 23 Ch. D. 313; Jarman (6th ed.), p. 744.

(*u*) 1 Bro. Ch. 238.

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executor. His brother H. subsequently, by his will, gave all his estates, by local descriptions, to certain uses therein mentioned, and all his money, securities for money, goods, chattels, and personal estate, not before disposed of, to his executors, for certain trusts mentioned in his will. Thurlow, C., dismissed the bill brought by the heir-at-law to have the money laid out in land. "If," said he, "A B has in his possession £20,000 to be laid out in land for his use, he has nobody to sue; the right and the thing centering in one person, the action is extinguished"; and after citing and commenting upon the cases on this subject, his Lordship added: "The use I make of these cases, notwithstanding the *dicta* they contain, is this, that where a sum of money is in the hands of one without any other use but for himself, it will be money, and the heir cannot claim. . . . But whether that is clearly so or not, circumstances of demeanour in the person (even though slight) will be sufficient to decide it: a very little would do; receiving it from the trustees, there is no doubt, would be sufficient. Lord Bath did receive it: he had it in his hands. Suppose he had it by way of covenant—otherwise, where would there be an end? If he kept it, subject to a covenant to lay it out for fifty years, should the heir come for it at the end of that term? It would lead to infinite inconveniences." This decision was affirmed on appeal to the House of Lords (*x*), and went, as Eldon, C., said, in *Wheldale* v. *Partridge* (*y*), "no further than this, that if the property was *at home*, in the possession of the person under whom they claimed as heir and executor, the heir could not take it; but if it stood out in a third person he might; and the question in that cause was, not upon the equity between the heir and executor, but whether the money was at home" (*z*).

3. Conversion of Land into Money.

Land agreed or directed to be sold will be considered as money, and as such will not pass under a devise of land (*a*), but will pass under a general residuary bequest of personal estate by the *cestui que trust* (*b*).

(*x*) 7 Bro. Ch. 530.

(*y*) 8 V. 235.

(*z*) *Chaplin* v. *Horner*, 1 P. W. 483; *Bowes* v. *Shrewsbury*, 5 Bro. P. C. 144: *Rich* v. *Whitfield*, 2 Eq. 583; *Chandler* v. *Pocock*, 16 Ch. D. 648.

(*a*) *Adams* v. *Austin*, 3 Russ. 100, 461; Theobald, 8th ed., p. 261.

(*b*) *Stead* v. *Newdigate*, 2 Mer. 521; *Elliott* v. *Fisher*, 12 Si. 505; *Farrar* v. *Winterton*, 5 B. 1; Theobald, 8th ed., p. 261.

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Aliens.—An alien, although he could not, previously to the Naturalization Act, 1870, hold land as against the Crown, would, nevertheless, be entitled to the proceeds arising from the sale of land devised to trustees to sell for his benefit (*c*). But now, by the British Nationality and Status of Aliens Act, 1914, s. 17 (re-enacting section 2 of the Naturalization Act, 1870), aliens may hold or dispose of property of every description (other than a British ship) like British-born subjects (*d*).

Mortmain.—A bequest of money to arise from the sale of real estate, or a legacy from a fund to be produced by such a sale, was formerly within the Mortmain Act (*e*), not because it came within its express words, but because it came within its meaning, inasmuch as if such a bequest were allowed, the charity to whom the bequest was made might elect to take the land (*f*). And even when land has been directed to be converted into money by a former instrument, a bequest of the whole or part of the proceeds thereof by a party entitled thereto was void under the Mortmain Act (*g*).

Now by the Mortmain and Charitable Uses Act, 1891 (54 & 55 Vict. c. 73), s. 3, "land" is defined so as to include tenements and hereditaments, corporeal or incorporeal of any tenure, but not money secured on land or other personal estate arising from or connected with land. By section 5 land may be assured by will to or for the benefit of any charitable use, but except as provided by the Act, such land is to be sold within one year from the death of the testator. The Act further provides (section 7) that any personal estate by will directed to be laid out in the purchase of land to or for the benefit of any charitable use, except as provided by the Act, be held for the benefit of the charitable uses as though there had been no such direction to lay it out in the purchase of land. Thus the proceeds of land subject to an immediate trust for sale are not land within the meaning of the Act of 1891 (*h*). But an immediate terminable interest in the income of land subject to a trust for sale at a future date is land within the meaning of the Act (*i*).

(*c*) *Du Hourmelin* v. *Sheldon*, 1 B. 79, affirmed on appeal by Lord Cottenham, 4 My. & C. 525. (*d*) *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343.

(*e*) 9 Geo. 2, c. 36.

(*f*) *Att.-Gen. Weymouth*, Amb. 20; *Paice* v. *The Archbishop of Canterbury*, 14 V. 364; *Att.-Gen.* v. *Harley*, 5 Madd. 321; *The Incorporated, etc., Society* v. *Coles*, 5 De G. M. & G. 331; *Robinson* v. *R.*, 19 B. 201.

(*g*) *Att.-Gen.* v. *Harley*, 5 Madd. 321; *Brook* v. *Badley*, 4 Eq. 106; L. R. 3 Ch. 672; *Re Watts*, 29 Ch. D. 947. (*h*) *Re Sidebottom*, [1902] 2 Ch. 389.

(*i*) *Re Ryland*, [1903] 1 Ch. 467.

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4. When Conversion takes place.

By Contract.—Where a vendor of real estate dies before completion, the question whether there is conversion or not depends upon whether the vendor at the time of his death was under such an agreement as equity would enforce against him (*k*). Where no specific performance of a contract is possible there is no conversion (*l*).

A mere notice to treat given by a railway company, or other persons having compulsory powers to purchase lands, to an owner of land in fee (being *sui juris*), although it may so far constitute an obligation as to enable the company to restrain the landowner from putting up the property for sale by auction (*m*), or creating any onerous interest thereon (*n*), will not operate as a conversion of the land into personalty (*o*), although the landowner state the price he is willing to accept, if he die before the acceptance of his offer (*p*). Nor will conversion take place where the contract with the landowner merely fixes the price per acre, without mentioning the quantity to be taken, and the purchase-money paid for the land taken after the owner's death will be realty (*q*).

But where a notice to take lands by a company under their compulsory powers is followed up by the company and landowner fixing upon the price, the contract is complete, and conversion will take place (*r*), and the result is the same where the price is ascertained either by arbitration (*s*), by the valuation of two surveyors (*t*), or the verdict of a jury (*u*). So where A devises an estate to B and contracts to sell it, but dies before completion, the devise to B will be adeemed, and the purchase-money will form

(*k*) See *Lysaght* v. *Edwards*, 2 Ch. D., at p. 506; Theobald, Wills, 8th ed., p. 287.

(*l*) *Edwards* v. *West*, 7 Ch. D. 858; *Thomas* v. *Howell*, 34 Ch. D. 166.

(*m*) *Met. Ry. Co.* v. *Woodhouse*, 13 W. R. 516.

(*n*) *Mercer* v. *L. St. H. S. L. Ry.*, [1903] 1 K. B. 652.

(*o*) *Haynes* v. *H.*, 1 Dr., & Sm. 426; but see *Walker* v. *The E. C. Ry. Co.*, 6 Ha. 594.

(*p*) *Re Battersea Park Acts*, *Re Arnold*, 32 B. 591; *Richmond* v. *N. L. Ry. Co.*, 5 Eq. 352, 358.

(*q*) *Ex p. Walker*, Drew. 508.

(*r*) *Ex p. Hawkins*, 13 Si. 569; *Watts* v. *W.*, 17 Eq. 217; *Re The Manchester, etc., Ry. Co.*, 19 B. 365; *The Regent's Canal Co.* v. *Ware*, 23 B. 575; *Nash* v. *The Worcester, etc., Commissioners*, 1 Jur. (N.S.) 973; *Adams* v. *L. and Blackwall Ry. Co.*, 2 Mac. & G. 118; *Re Pigott*, 18 Ch. D. 146, 150.

(*s*) *Harding* v. *Met. Ry. Co.*, L. R. 7 Ch. 154.

(*t*) *Watts* v. *W.*, 17 Eq. 217.

(*u*) *Haynes* v. *H.*, 1 Dr. & Sm. 426.

part of the testator's personal estate from the time fixed for completion (*x*). But until completion the devisee or heir would be entitled to the rents (*y*).

Under Direction to Convert.—The direction to convert either money into land or land into money must be imperative (*z*); for if conversion be merely optional, the property will be considered as real or personal, according to the actual condition in which it is found. A gave £500 to B, in trust that B should lay out the same upon *a purchase of lands or put the same out on good securities*, for the separate use of his daughter H (the plaintiff's then wife), her heirs, executors, and administrators, and died in 1729. In 1731, H, the daughter, died without issue, before the money was invested in a purchase. The husband, as administrator, brought a bill for the money against the heir of H, and the money was decreed to the adminstrator; for, the wife not having signified any intention of a preference, the Court would take it as it was found: if the wife had signified any intention, it should have been observed, but it was not reasonable at that time to give either her heir or administrator, or the trustee, liberty to elect; for, Lord Talbot said, it was originally personal estate, and yet remained so, and nothing could be collected from the will as to what was the testator's principal intention (*a*). So, if money is directed to be laid out "in Government *or* other securities *or* in the purchase of freeholds," or "to remain at interest, or be laid out in land," or "to be laid out in freeholds or leaseholds"; or if similar expressions are made use of, leaving the nature of the investment *optional*, or which do not sufficiently indicate an intention that the money should be laid out in land at all events, no conversion will take place until the trustees have actually exercised their discretion, which, when clearly given to them, the Court will not control (*b*). So where such is clearly the intention of the testator,

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(*x*) *Watts* v. *W.*, 17 Eq. 217; *Re Manchester, etc., Ry. Co.*, 19 B. 365.

(*y*) *Watts* v. *W.*, *supra*; *Townley* v. *Bedwell*, 14 V. 591; and see further *Lawes* v. *Bennett*, 1 Cox, 167, *infra*, p. 312; *Knollys* v. *Shepherd*, 1 J. & W. 499; *Edwards* v. *West*, 7 Ch. D. 858.

(*z*) *Re Newbould*, 110 L. T. 6; *Gresham, etc., Soc.* v. *Crowther*, [1915] 1 Ch. 214. A mere declaration that personalty shall devolve or pass as realty is in itself inoperative, though it may help the Court to construe a doubtful instrument as creating an imperative trust for conversion: *Re Walker*, [1908] 2 Ch. 705; *Re Twopenny's Settlement*, [1924] 1 Ch. 522.

(*a*) *Curling* v. *May*, 3 Atk. 255; *Re Ibbitson*, 7 Eq. 226.

(*b*) *Walter* v. *Maunde*, 19 V. 424; *Van* v. *Barnett*, 19 V. 102; *Walker* v. *Denne*, 2 V. 170; *Wheldale* v. *Partridge*, 5 V. 388; 7 R. R. 37; *Atwell* v. *A.*,

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the destination of the property, even under the will itself, may depend upon the exercise by trustees of their option to sell (*c*).

The vesting also of property may be made, by clear and unequivocal terms, to depend upon the time when the option to sell is exercised (*d*). But if there is a *trust for sale*, neglect to exercise the trust will not affect the destination of the property (*e*).

A mere power to trustees of residuary real estates given together with residuary personalty to executors upon trust, will not have the effect of converting the real estate, even though it be accompanied by a declaration that the testator's residuary estate shall for the purpose of transmission be impressed with the quality of personal estate from the time of his decease (*f*). So where trustees have a mere power with the *consent* of a person in possession of certain settled estates to lay out personal property in land to be settled to the same uses, no absolute conversion takes place (*g*). And where a mortgage deed contained a power of sale with a trust of the surplus proceeds in favour of the mortgagor, "his heirs and assigns," it was held that the surplus proceeds of sale must be treated as personalty notwithstanding the language of the trust (*h*). But the context may show that the power is in the nature of a trust, and that conversion is imperative (*i*).

Although conversion is apparently optional, as where trustees are directed to lay out personalty, "either in the purchase of lands of inheritance, or at interest," "in freeholds, leaseholds, or copyholds," or "in land or some other securities," as they shall think most fit and proper; yet if the limitations are adapted only to real estates, so as to manifest the testator's intention that land should be ultimately purchased, the money must be considered as land, although it be not actually so invested by trustees (*k*).

When there is a direction that money should be laid out in the

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13 Eq. 23; *Re Whitty's T.*, 9 Ir. R. Eq. 41; *Re Twopenny's Settlement*, [1924] 1 Ch. 522.

(*c*) *Polley* v. *Seymour*, 2 Y. & C. Ex. 708; *Brown* v. *Bigg*, 7 V. 279; *Harding* v. *Trotter*, 21 L. T. 279; *Yates* v. *Y.*, 28 B. 637; *Re Sinclair*, 56 L. T. 83.

(*d*) *Elwin* v. *E.*, 8 V. 547; *Faulkener* v. *Hollingsworth*, *ibid.* 558.

(*e*) *Minor* v. *Battison*, 1 A. C. 428.

(*f*) *Hyett* v. *Mekin*, 25 Ch. D. 735; and see *Re Dyson*, [1910] 1 Ch. 750.

(*g*) *De Beauvoir* v. *De B.*, 3 H. L. C. 524; *Lucas* v. *Brandreth*, 28 B. 273; *Edwards* v. *Tuck*, 23 B. 268; *Re Bird*, [1892] 1 Ch. 279.

(*h*) *Re Grange*, [1907] 2 Ch. 20, and see *infra*, note (6).

(*i*) *Grieveson* v. *Kirsopp*, 2 Keen, 653; and cases *infra*, p. 309.

(*k*) *Cowley* v. *Hartstonge*, 1 Dow, 361; *Hereford* v. *Ravenhill*, 5 B. 51; *Cookson* v. *Reay*, 5 B. 22; 12 Cl. & Fin. 120; and see *Johnson* v. *Arnold*, 1 Ves. Sen. 169; *Simpson* v. *Ashworth*, 6 B. 412; *Ralph* v. *Carrick*, 5 Ch. D. 984; *Earlom* v. *Saunders*, Amb. 241.

purchase of land, a mere temporary provision, that in the meantime and until such purchase could be found, the money is to be placed out on securities, will not prevent immediate conversion from taking place (*l*). If, however, it appears to be the intention that in a particular event, as, for instance, the death of a husband before his wife, the investment in securities is not to be of a merely temporary but of a final character, conversion will not take place (*m*).

When there is a trust to sell within a particular time, it will be considered merely as directory, and conversion will take place, although no sale takes place within the time mentioned (*n*). So also when lands are directed to be sold, although the sale is to take place as soon as the trustees should see necessary for the benefit of the *cestui que trust* (*o*).

Conversion in favour of a particular legatee, to whom the proceeds of sale are bequeathed, will not be prevented by a devise of the property in an alternative event, in terms applicable to its unconverted state, inasmuch as the testator may have contemplated the possibiilty of the event taking place before a sale; moreover it may have been intended that as to one legatee, the property might be real, and as to the other legatee, to whom it was given on an alternative event, personalty (*p*). But a trust for conversion will not be prevented from being imperative in both alternatives, because it is less necessary for distribution in one event than the other (*q*).

Sale at Request or on Consent.—Where conversion is to take place *at the request* of certain persons, if the words of request are merely inserted for the purpose of enforcing the obligation to convert, although a conversion has taken place without consent, it will be considered to have been properly made (*r*). But where

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(*l*) *Edwards* v. *Warwick*, 2 P. W. 171.

(*m*) *Wheldale* v. *Partridge*, 5 V. 388; 8 V. 227.

(*n*) *Pearce* v. *Gardner*, 10 Ha. 287; *Cuff* v. *Hall*, 1 Jur. (N.S.) 972; *Tily* v. *Smith*, 1 Coll. 434.

(*o*) *Doughty* v. *Bull*, 2 P. W. 320; see also *Robinson* v. *R.*, 19 B. 494; *Re Raw*, 26 Ch. D. 601; *Re Heathcote*, 58 L. T. 43.

(*p*) *Ashby* v. *Palmer*, 1 Mer. 296; *Cowley* v. *Hartstonge*, 1 Dow, 381; *Ward* v. *Arch*, 15 Si. 389.

(*q*) *Wall* v. *Colshead*, 2 De G. & J. 683; *Wilson* v. *Coles*, 6 Jur. (N.S.) 1003; *Crabtree* v. *Bramble*, 3 Atk. 680.

(*r*) *Thornton* v. *Hawley*, 10 V. 137; *Triquet* v. *Thornton*, 13 V. 345; *Van* v. *Barnett*, 19 V. 102; *Symons* v. *Rutter*, 2 Vern. 227, approved in *Pulteney* v. *Darlington*, 1 Bro. Ch. 238; *Lechmere* v. *Carlisle*, 3 P. W. 219; *Att.-Gen.* v. *Dodd*, [1894] 2 Q. B. 150; *Re Tweedie and Miles*, 27 Ch. D. 315; *Biggs* v.

words requiring the request or consent of parties to a sale are inserted for the purpose of giving a *discretion to them*, if the sale takes place without their request or consent the proceeds of the sale will still be considered as land (*s*).

Discretionary Power of Sale or Trust for Sale.—Where there is a mere discretionary power to convert real property into personalty, and to distribute it amongst certain persons, such persons must take the property in the actual condition in which they find it (*t*). The discretionary power of sale may be in form a trust, as in *Re Hotchkys* (*u*), and the discretion of the trustees will not be interfered with by the Court (*x*).

The result will be different where the power is imperative, and in the nature of a trust (*y*).

Implied Conversion.—The conversion of land into money may be implied without any express words directing a sale as in *Mower* v. *Orr* (*z*), where the property, consisting of real and personal estate, was divided into shares, with directions as to the investment of some of such shares, and the realty was held to be converted. But in order to effect such conversion the intention must be clear (*a*).

Double Conversion.—A double conversion may be directed leaving the notional character of the land unchanged. Thus, when land is directed to be sold and the proceeds invested in the purchase of land, it will be regarded as real estate though no sale has actually taken place (*b*), and after a sale of such land before the trust for

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Peacock, 22 Ch. D. 284; cf. *Att.-Gen.* v. *Dodd*, [1894] 2 Q. B. 150; *Re Ffennell*, [1918] 1 Ch. 91.

(*s*) *Davies* v. *Goodhew*, 6 Sim. 585; *Re Taylor's Settlement*, 9 Ha. 596; *Huskisson* v. *Lefevre*, 26 B. 157; *Sykes* v. *Sheard*, 33 B. 114; *Re Goswell's Trusts*, [1915] 2 Ch. 106.

(*t*) *Walter* v. *Maunde*, 19 V. 424; *Rich* v. *Whitfield*, 2 Eq. 583; *Polley* v. *Seymour*, 2 Y. & C. Ex. C. 708; *Cowley* v. *Hartstonge*, 1 Dow, 378; *Bourne* v. *B.*, 2 Ha. 35; *Edwards* v. *Tuck*, 23 B. 268; *Lucas* v. *Brandreth*, 28 B. 273; *Yates* v. *Y.*, 28 B. 637; *Re Beaumont's T.*, 32 B. 191; *Re Ibbitson*, 7 Eq. 226; *Miller* v. *M.*, 13 Eq. 263; *Atwell* v. *A.*, 13 Eq. 23.

(*u*) 32 Ch. D. 408, 416. See also *Robinson* v. *R.*, 19 B. 494; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Raw*, 26 Ch. D. 601.

(*x*) *Re Courtier*, 34 Ch. D. 136; *Re Ocock*, 40 Sol. Jo. 210.

(*y*) *Grieveson* v. *Kirsopp*, 2 Ke. 653; *Burrell* v. *Baskerfield*, 11 B. 525; *Nickisson* v. *Cockill*, 3 De G. J. & S. 622; *Re Courtier*, 34 Ch. D. 136.

(*z*) 7 Ha. 475.

(*a*) *Cornick* v. *Pearce*, *ibid.*, 477; *Greenway* v. *G.*, 1 Gif. 131; 2 De G. F. & J. 128; *Affleck* v. *James*, 17 Si. 121; *Murton* v. *Markby*, 18 B. 196; *Lucas* v. *Brandreth*, 28 B. 273; *Tait* v. *Lathbury*, 1 Eq. 174; *Re Garnett Orme and Hargreaves' Contract*, 25 Ch. D. 595; *Re Holloway*, 60 L. T. 46.

(*b*) *Sperling* v. *Toll*, 1 Ves. Sen. 70; *Pearson* v. *Lane*, 17 V. 101.

reinvestment is executed the proceeds will be regarded as real estate (*c*). But if part of such land be sold, and the money not yet reinvested, the money will not pass under a devise of all the testator's interest in the land, if there is any part of the land unsold which would answer the description, nor if such land be sold will the money pass by the devise of lands in a particular county (*d*).

5. Conversion for Fiscal Purposes—Death Duties.

In cases where the question whether the Crown has the right to demand payment of some particular death duty turns on whether the property in respect of which the duty is claimed is real or personal, the Courts have given full effect to the doctrine of conversion (*e*).

Legacy Duty and Succession Duty.—Legacy duty is payable in respect of all real estate of the deceased converted in equity at the date of his death; as, for instance, real estate sold by him, but not then conveyed (*f*), or his share in foreign real estate forming part of the assets of a partnership of which he was a member, and *a fortiori* his share in partnership real assets in England (*g*). Where the deceased died before July 1, 1888, " moneys to arise from the sale, mortgage or other disposition of any real or heritable estate directed to be sold, mortgaged or otherwise disposed of," were made liable to the payment of *legacy* duty under the Stamp Act, 1815 (*h*). Such moneys are now, where the deceased died on or after July 1, 1888, liable to succession duty as on a succession to personal property (*i*).

Estate Duty.—This duty is leviable on all property, *real or personal*, which passes on the death of a person dying after the commencement of the Finance Act, 1894.

As between Crown and Subject.—A trust enforceable in an English Court against English trustees for the conversion of foreign

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(*c*) *Re Bird*, [1892] 1 Ch. 279; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*d*) *Re Cleveland's S. E.*, [1893] 3 Ch. 244.

(*e*) *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243; *Forbes* v. *Steven*, 10 Eq. 178; *Re Gunn*, 9 P. D. 242; *Att.-Gen.* v. *Ailesbury*, 12 A. C. 672; *Att.-Gen.* v. *Dodd*, [1894] 2 Q. B. 150; *Att.-Gen.* v. *Johnson*, [1907] 2 K. B. 885.

(*f*) *Att.-Gen.* v. *Brunning*, 8 H. L. C. 243.

(*g*) *Forbes* v. *Steven*, 10 Eq. 178.

(*h*) 55 Geo. 3, c. 184, Sched. III. It should be noted that section 29 of the Succession Duty Act, 1853, rendered moneys arising under trusts for the sale of land which were not chargeable with legacy duty under the Stamp Act liable to succession duty as personal estate.

(*i*) 51 Vict. c. 8, s. 21, sub-s. 2.

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real estate causes that real estate to be regarded as locally situate in England and liable to estate duty (*k*). Again, where a testator dying before the commencement of the Act of 1894 directs the conversion of personal estate into realty and settles the converted personalty, the payment of probate duty upon such personalty exempts land purchased under the trust from the payment of estate duty on the death of a person having a limited interest under the settlement or under a compound settlement made up of the will and a resettlement (*l*).

As between Beneficiaries.—It is to be noted that real property of the deceased in the United Kingdom effectually converted in equity in his life passes to his executors as such, and bears no charge under section 9, sub-section 1 of the Act of 1894. The estate duty attributable thereto will accordingly be borne by the general residuary estate (*m*).

6. Of the Period from which Conversion Commences.

Where absolute conversion is directed to be made by *deed*, whatever be the time at which conversion is directed, it will take place from the delivery of the deed (*n*).

In the case of a *will* it will take place from the death of testator (*o*), although there may be a direction that a sale should take place "whenever it should appear advantageous" (*p*); unless it be directed to take place at another time, as, for instance, upon the death of a person entitled for life independently of the will (*q*).

Rents until Conversion.—Until conversion actually takes place, the person to whom the interest of the proceeds of the estate directed to be sold is given, will be entitled, in lieu thereof, to the rents of the estate (*r*). Thus, if an estate be devised to trustees upon trust for sale after the testator's death, or after the death of A, and to pay the interest of the proceeds to B, for life, B will

(*k*) *Att.-Gen.* v. *Johnson*, [1907] 2 K. B. 885; cf. *Lord Sudeley* v. *Att.-Gen.*, [1897] A. C. 11; *Re Smyth*, [1898] 1 Ch. 89.

(*l*) *Att.-Gen.* v. *Earl of Londesborough*, [1905] 1 K. B. 98.

(*m*) Cf. *Re Grimthorpe*, [1908] 1 Ch. 666; [1908] 2 Ch. 675.

(*n*) *Griffith* v. *Ricketts*, 7 Ha. 299; *Clarke* v. *Franklin*, 4 Kay & J. 257. Cf. *Re Grimthorpe*, [1908] 2 Ch. 675.

(*o*) *Beauclerk* v. *Mead*, 2 Atk. 167; see *Ward* v. *Arch*, 15 Si. 389; *Hutcheon* v. *Mannington*, 1 V. 336. Cf. *Re Bacon*, [1907] 1 Ch. 475.

(*p*) *Robinson* v. *R.*, 19 B. 495; *Re Raw*, 26 Ch. D. 601.

(*q*) *Fitzgerald* v. *Jervoise*, 5 Madd. 25.

(*r*) See *Re Searle*, [1900] 2 Ch. 829. *Re Darnley*, [1907] 1 Ch. 159. *Re Oliver*, [1908] 2 Ch. 74; *Re Sherry*, [1913] 2 Ch. 508.

be entitled to the rents of this estate in the first instance from the death of the testator; in the second from the death of A, until the sale of the estate takes place (*s*).

When lands are directed to be sold and the proceeds to be invested in the purchase of other lands to be settled to the use of a person for life without impeachment of waste, although there is a direction that the rents and *profits* of the lands till sold are to be to the use of the same persons who would be entitled to the lands to be purchased, the tenant for life cannot cut timber on the estate to be sold, because if he were allowed to do so on that estate as well as on that to be bought, he would have double waste (*t*).

Option to Purchase.—It has been held in several cases, commencing with *Lawes* v. *Bennett* (*u*), that the exercise of an option of purchase given in a lease has a retroactive effect and operates to convert the reversion into personalty as from the date of the lease (*x*). But the decision of the Court of Appeal in *Woodall* v. *Clifton* (*y*), and the judgments of Warrington, J., in that case and in *Corporation of Worthing* v. *Heather* (*z*), have limited the operation of this rule. In *Lawes* v. *Bennett* (*a*), Witterwronge, in 1758, demised a farm to Douglas, his executors, administrators, and assigns, for seven years, and there was an agreement endorsed upon the lease, that if Douglas should, before September 29, 1765, give notice in writing of his wish to purchase the inheritance of the premises for £3,000, Witterwronge agreed to sell and to execute to him a proper conveyance thereof. Witterwronge died in 1763, having by his will devised all his real estates to the defendant Bennett, and all his personal estates to the defendant Bennett, and to the plaintiff Mary, the sister of the defendant Bennett, equally. In 1762 Douglas assigned the lease and the benefit of the agreement to Waller, and on February 2, 1765, Waller called upon Bennett to perform the contract entered into by Witterwronge, and he, Bennett, accordingly executed a conveyance to Waller in fee. Bennett having died, a bill was filed by Lawes, the husband of Bennett's sister, against the personal representative of Bennett,

(*s*) *Pearson* v. *Lane*, 17 V. 101; *Casamajor* v. *Strode*, 19 V. 391 (n.); *Fitzgerald* v. *Jervoise*, 5 Madd. 25, where the marginal note is inaccurate; *Miller* v. *M.*, 13 Eq. 263.

(*t*) *Plymouth* v. *Archer*, 1 Bro. Ch. 159; *Burges* v. *Lamb*, 16 V. 180.

(*u*) 1 Cox, 167.

(*x*) See also *Re Goodall*, 65 L. J. Ch. 63.

(*y*) [1905] 2 Ch. 257.

(*z*) [1905] 2 Ch., at p. 259; [1906] 2 Ch. 532.

(*a*) 1 Cox, 167. See *Re Adams*, 27 Ch. D. 394.

claiming a moiety of the £3,000 and interest, and Kenyon, M.R., so decreed, saying : " It is very clear, that if a man seised of a real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is, that it is left to the election of Douglas whether it shall be real or personal. * * * When the party who has the power of making the election has elected, the whole is to be referred back to the original agreement, and the only difference is, that the real estate is converted into personal at a future period " (*b*). In *Re Isaacs* (*c*), I. demised certain premises of which he was owner in fee to C. for the life of the lessor, with an option to purchase within six months after his decease. I. died *intestate*, and C. gave notice to the administrator and heir-at-law of I. that he intended to exercise the option. Chitty, J., held the principle of *Lawes* v. *Bennett* (*d*) applied, and the purchase-money went to the personal representative.

But the principle of *Lawes* v. *Bennett* is not to be extended, and it has, therefore, been held not to apply as between vendor and purchaser. Thus, in *Edwards* v. *West* (*e*), a landlord covenanted to insure for £14,000, and the tenant had the option at a fixed time to purchase for £15,200. There was no stipulation whatever (except in a contingency which did not happen) with regard to the insurance moneys. Before the time for exercising the option, the buildings demised were burnt, and the landlord received from the insurance offices nearly £12,000 for the damage done. The tenant then exercised his option to purchase, and claimed the insurance money as part of his purchase, on the ground that the option to purchase when exercised related back to the time of the contract giving the option, since which it was argued the property had been partially converted into personalty by the fire and the receipt of the insurance money, and that the purchaser was entitled to it in that shape. Fry, J., being of opinion that conversion, according to general principles, cannot relate back to an earlier date than that of the contract constituted by the exercise of the option, said, that although he should follow

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(*b*) See also *Townley* v. *Bedwell*, 14 V. 596; *Weeding* v. *W.*, 1 John. & H. 424; *Collingwood* v. *Row*, 26 L. J. Ch. 649; *Woods* v. *Hyde*, 10 W. R. 339; *Re Marlay*, [1915] 2 Ch. 264; *Re Blake*, [1917] 1 Ch. 18.

(*c*) [1894] 3 Ch. 506.

(*d*) 1 Cox, 167.

(*e*) 7 Ch. D. 858; cf. *Andrews* v. *Patriotic Ass., etc.*, 18 L. R. Ir. 355; *Re Adams, etc.*, 27 Ch. D. 394; *Re Goodall*, 65 L. J. Ch. 63.

Lawes v. *Bennett* (*f*) in a case between real and personal representatives of the person who granted the option, nevertheless, as that case, according to the language of Lord Eldon, in *Townley* v. *Bedwell* (*g*), and of Kindersley, V.-C., in *Collingwood* v. *Row* (*h*), was not consistent with the general principles applicable to cases of conversion, he did not think that he was at liberty to extend the doctrine, so as to imply that there was a conversion from the date of the contract giving the option *as between vendor and purchaser*, and he held the purchaser had no claim to the insurance money.

And, moreover, where the giver of the option dies *testate*, there may be such an indication of intention in the testator's will as to take the case out of the rule in *Lawes* v. *Bennett* (*i*). Thus, in *Re Pyle* (*k*), a testator, by his will in 1886, devised certain real estate specifically, and the residue of his realty and personalty to others. By a codicil in June, 1890, he confirmed his will. On the same day, but whether before or after the execution of the codicil was not known, he granted a lease of the specifically devised property with an option of purchase to the lessee. After the testator's death the lessee exercised the option. Held, by Stirling, J., that there was sufficient indication of an intention to take the case out of the rule in *Lawes* v. *Bennett*, that the principle laid down by Wood, V.-C., in *Weeding* v. *W.* (*l*), applied, and that the specific devisees were entitled to the proceeds of sale.

In *Reynard* v. *Arnold* (*m*), a tenant who had an option of purchasing the property, was bound to insure against fire, and it was agreed that all moneys recovered under the insurance should be applied in reinstating the premises. He insured in a sufficient sum. The premises were damaged by fire, and it then appeared that the landlord had a policy on the premises in another office, of which the tenant had no notice. Both policies had average clauses, the two offices apportioned the amount of loss between the two policies, and the landlord received what was thus payable under the policy effected by him. The tenant shortly after the

(*f*) 1 Cox, 167.
(*g*) 14 V. 591.
(*h*) 3 Jur. (N.S.) 785.
(*i*) See *Emuss* v. *Smith*, 2 De. G. & Sm. 722, and remarks of Chitty, J., thereon in *Re Isaacs*, [1894] 3 Ch., at p. 510.
(*k*) [1895] 1 Ch. 724.
(*l*) 1 John. & H., at p. 431.
(*m*) L. R. 10 Ch. 386; cf. *Andrews* v. *Patriotic Ass.*, *etc.*, 18 L. R. Ir. 355.

fire gave notice to exercise his option of purchase, and proposed that the insurance moneys under both policies should go in part payment of the purchase-money. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and insisted on the money under the other policy being applied in reinstating the premises, and on the tenant declining to do this, brought ejectment against him. It was held, that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property, after the tenant had exercised his option of purchase. It is obvious that the money which the lessor had received from the insurance office was the measure of the injury which he had done to the lessee by diminishing his rights to receive under his policy (*n*).

Until, however, the option to purchase is exercised, the rents and profits will go to the persons who were entitled to the property up to that time, as real estate. In *Townley* v. *Bedwell* (*o*), a testator granted a lease to T. for thirty-three years, with a proviso that "if T., his executors, administrators, or assigns should be desirous to purchase the premises within six years, he T., should pay to the testator, his heirs or assigns, £600." The testator died without having devised the premises; and before the expiration of the lease T. declared his option to purchase. It was held by Eldon, C., upon the authority of *Lawes* v. *Bennett*, that from the time of the exercise of the option T. was entitled to the premises, and that he should pay interest upon the purchase-money, which money and interest he held to be personal estate of the testator, and which ought to go to his next-of-kin, but that the rents of the premises, until the option was exercised belonged to the heir (*p*).

Where *after* the date of the contract giving the option, a specific devise is made of the property subject to it, and a general bequest of the personal estate, the purchase-money will go to the specific devisee, when the option is exercised (*q*). Where such

(*n*) See *Edwards* v. *West*, 7 Ch. D. 858, 864.

(*o*) 14 V. 591.

(*p*) See also *Ex p. Hardy*, 30 B. 206; *Collingwood* v. *Row*, 3 Jur. (N.S.) 785; 26 L. J. Ch. 649; 5 W. R. 484; *Goold* v. *Teague*, 7 W. R. 84; *Weeding* v. *W.*, 1 John. & H. 424; *Woods* v. *Hyde*, 10 W. R. 339.

(*q*) *Drant* v. *Vause*, 1 Y. & C. C. C. 580; *Collingwood* v. *Row*, 5 W. R. 484; Theobald, 8th ed., p. 176.

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a will is made *before* the contract the proceeds of sale will go to the residuary legatee (*r*).

Where a testator entered into a contract granting an option of purchase in respect of certain property, and on the same day (but whether before or after executing the contract was not shown) executed a codicil which confirmed in general terms a will which the testator had made and by which he had specifically devised the property to A, it was held (the option having been exercised) that A was entitled to the proceeds of the sale (*s*).

7. Election to take Property Unconverted.

Who may Elect.—The notional conversion hereinbefore considered may be put an end to by an absolute owner, who, being *sui juris*, is competent to do so, by electing to take the property in its actual state; and the Court will not direct a conversion against this election, because, when converted, he might immediately reconvert it; for, as is quaintly observed by Lord Cowper, in *Seeley* v. *Jago* (*t*), "Equity, like nature, will do nothing in vain." So where the obligation to lay out money in land and the right to call for the money are vested in the same person, the obligation is at an end, and the property is "at home" (*u*). Similarly where trustees have a power to sell land comprised in a will or settlement, the *cestuis que trust* where the property has become vested in them absolutely, and they are *sui juris*, may by electing to take the property as it stands, put an entire end to the power and the trusts (*x*), but if they do not make such election the trustees may exercise the power, if such appears to have been the intention of the testator or settlor (*y*).

An infant cannot ordinarily elect (*z*), but the Court may sanction his election or elect for him (*a*).

(*r*) *Weeding* v. *W.*, 1 John. & H. 424; *Goold* v. *Teague*, 7 W. R. 84; *Emuss* v. *Smith*, 2 De G. & Sm. 722; Theobald, 8th ed., p. 176.

(*s*) *Re Pyle*, [1895] 1 Ch. 724.

(*t*) 1 P. W. 389.

(*u*) *Chichester* v. *Bickerstaff*, 2 Vern. 295; *Chandler* v. *Pocock*, 16 Ch. D. 648; *Re Daveron*, [1893] 3 Ch. 421; *Re Lord Grimthorpe*, [1908] 1 Ch. 666; [1908] 2 Ch. 675.

(*x*) *Re Cotton's Trustees*, 19 Ch. D. 624. Cf. *Re Jenkins*, [1903] 2 Ch. 362.

(*y*) *Re Jenkins*, *supra*; see L. P. Act, 1925, s. 23, as to protection of purchasers from trustees for sale.

(*z*) *Carr* v. *Ellison*, 2 Bro. Ch. 56; *Van* v. *Barnett*, 19 V. 102, 109; *Spencer* v. *Harrison*, 5 C. P. D. 97.

(*a*) *Robinson* v. *R.*, 19 B. 494; *Jessopp* v. *Watson*, 1 My. & K. 665.

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A lunatic cannot elect (*b*), and the right will not, where it can be avoided, be exercised by the Court (*c*).

Before the Married Women's Property Act, 1882, a married woman, with the concurrence of her husband, under the Fines and Recoveries Act, could by deed executed in compliance with its provisions, make her election to take money directed to be laid out in land. So, likewise, she might by a similar deed elect to take real estate directed to be converted into money (*d*). If there be a fund in Court impressed with the character of realty, a woman married under the old law, upon being separately examined, may elect to have it paid out to her husband as personalty (*e*).

A married woman, however, was never under any such disability as regards property settled to her separate use without restraint on anticipation (*f*), and is of course free to elect as to property which is her separate estate by virtue of the Married Women's Property Acts.

Person Entitled subject to Charge.—A person entitled (subject to a charge) to real property vested in trustees upon trust for sale, may elect to take it as realty and thus effect a reconversion (*g*); provided that the parties entitled to the charge assent to, or acquiesce in such election taking place (*h*). If, after such election, the trustees sell the property, the proceeds (after payment of the charge) will be deemed to be real estate.

Delegated Power.—The power to reconvert or elect to retain property in its actual state may be delegated by the settlor to trustees or others (*i*), but it seems that they cannot exercise the power after the estate has become vested in persons absolutely entitled thereto; *secus*, if it is a *trust*, and either the necessity for the interference of the trustees continues (*k*), or all the *cestuis que*

(*b*) See *Re Jump*, [1903] 1 Ch. 129.

(*c*) *Ashby* v. *Palmer*, 1 Mer. 296; *Re Wharton*, 5 De G. M. & G. 33; *Dixie* v. *Wright*, 32 B. 662; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296.

(*d*) *May* v. *Roper*, 4 Si. 360; *Forbes* v. *Adams*, 9 Sim. 462; *Briggs* v. *Chamberlain*, 11 Ha. 69; *Franks* v. *Bollans*, L. R. 3 Ch. 717; *Bowyer* v. *Woodman*, 3 Eq. 313; *Miller* v. *Collins*, [1896] 1 Ch. 573.

(*e*) *Standering* v. *Hall*, 11 Ch. D. 652. (*f*) *Re Davidson*, 11 Ch. D. 341.

(*g*) *Re Gardner*, 1 Eq. R. 57; *Mutlow* v. *Bigg*, 1 Ch. D. 385.

(*h*) *Mutlow* v. *Bigg*, 1 Ch. D. 385, 394, 397; and see *Re Sturt*, [1922] 1 Ch. 429, 430.

(*i*) *Doncaster* v. *D.*, 3 Kay & J. 26; *Rich* v. *Whitfield*, 2 Eq. 583; and see *Re Bird*, [1892] 1 Ch. 279; *Re Bogg*, [1917] 2 Ch. 239.

(*k*) *Re Cooke's Contract*, 4 Ch. D. 454.

trust do not concur (*l*) in electing reconversion, or legacies are charged upon real estate directed to be converted (*m*).

Tenants in Common.—In the case of tenants in common, the rule was that where an estate is directed to be sold, and the money arising from the sale to be divided among several persons, all of them must concur in electing to take the estate unconverted, for none of them has a right to say that any part shall not be sold, and elect to take his share in land; for, to allow election in such a case, would be injurious to the sale of the entirety (*n*). No election can therefore take place so long as any beneficiary is disabled from electing (*o*). But if money be directed to be laid out in land, to the use of several persons as tenants in common, any one of them may elect to take his share of the money, for it has been said the residue of the money may be quite as advantageously invested in the purchase of land as the whole (*p*). By the effect of recent statutes it would seem that land which prior to such statutes would have been held by persons as tenants in common, will now in all cases be subject to a statutory trust for sale, and must therefore be regarded as personal estate (*q*). Under the Law of Property Act, 1925, s. 28, the statutory trustees for sale may, with the consents therein mentioned, make a partition of the property instead of selling the same and dividing the proceeds. But it is conceived that unless and until this power is exercised, the interests of the beneficiaries must be regarded as equitably converted into personal estate.

Remainderman.—As to whether a remainderman could elect, see the cases mentioned in note (*r*).

It appears to be settled that a person contingently entitled to the proceeds of real estate directed to be sold, may, pending the contingency, elect to take the estate as realty, and when the

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(*l*) *Biggs* v. *Peacock*, 22 Ch. D. 284. See *Re Tweedie and Miles*, 27 Ch. D. 315; and *Re Lord Sudeley*, [1894] 1 Ch. 334.

(*m*) *Re Dyson & Fowke*, [1896] 2 Ch. 720.

(*n*) *Deeth* v. *Hale*, 2 Moll. 317; *Smith* v. *Claxton*, 4 Madd. 484, 494; *Chalmer* v. *Bradley*, 1 J. & W. 59; *Trower* v. *Knightley*, 6 Madd. 134; *Elliott* v. *Fisher*, 12 Si. 505; *Holloway* v. *Radcliffe*, 23 B. 163, 171; *Re Davidson*, 11 Ch. D. 341, 348; *Re Heathcote*, 58 L. T. 43.

(*o*) *Re Douglas & Powell*, [1902] 2 Ch. 296; *Re Jump*, [1903] 1 Ch. 129.

(*p*) *Seeley* v. *Jago*, 1 P. W. 389; *Walker* v. *Denne*, 2 V. 182.

(*q*) L. P. Act, 1925, ss. 34 & 35; S. L. Act, 1925, s. 36.

(*r*) *Holloway* v. *Radcliffe*, 23 B. 163; *Re Gardner*, 1 Eq. R. 57; *Re Skeggs*, 2 De G. J. & S. 533; *Stead* v. *Newdigate*, 2 Mer. 521; *Gillies* v. *Longlands*, 4 De G. & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890; *Re Stewart*, 1 Sm. & G. 32; *Sisson* v. *Giles*, 3 De G. J. & S. 614; *Re Sturt*, [1922] 1 Ch. 416.

contingency happens, such election will become operative (*s*); provided that it happens during the lifetime of the person so electing (*t*).

Tenant in Tail.—A tenant in tail of money to be invested in land might, as against his issue, whom he might bar by fine, elect to take it in its actual state, and upon his election immediate payment would be made to him by the Court (*u*). But where there were remainders over, payment would not be made to the tenant in tail except by the consent of the remainderman, who could only be barred by a recovery (*x*). It is not essential that the election by a tenant in tail alone, or a tenant in tail and the remainderman, should be made in a suit, for if the tenant in tail with remainder to himself received the money to be laid out in land from the trustees, or if the tenant in tail with remainder to a stranger, with the concurrence of the remainderman, received it from the trustee, the election will be effectually made (*y*). A fund in Court representing entailed land will not be paid out without a disentailing deed (*z*). Where entailed land has been sold and the money is in Court, a subsequent deed purporting to disentail the land does not disentail the money (*a*). By section 133 of the Law of Property Act, 1925, every assurance or instrument executed or made after the commencement of that Act, which under the Fines and Recoveries Act would have been required to be enrolled, shall be as effectual for all purposes without such enrolment as if it had been duly enrolled within the time prescribed by the said Act for such enrolment.

How Election may be made.—Supposing the person competent to elect, election may be made either, (1) by express declarations, or, (2) by acts from which the Court will presume an election to have been made. But neither declaration nor act must be equivocal (*b*).

(*s*) *Meek* v. *Devenish*, 6 Ch. D. 566; *Re Potter*, 3 T. L. R. 420; and see and cf. *Re Daveron*, [1893] 3 Ch. 421; *Re Appleby*, [1903] 1 Ch. 565.

(*t*) *Re Sturt*, [1922] 1 Ch. 416, 428, 429.

(*u*) *Cunningham* v. *Moody*, 1 Ves. Sen. 176.

(*x*) *Trafford* v. *Boehm*, 3 Atk. 440; *Colwell* v. *Shadwell*, 1 P. W. 471, 485.

(*y*) *Trafford* v. *Boehm*, 3 Atk. 448; *Bath* v. *Bradford*, 2 Ves. Sen. 590; overruling *dicta* in *Pulteney* v. *Darlington*, 1 Bro. Ch. 236; *Pearson* v. *Lane*, 17 V. 101, 106.

(*z*) *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. D. 61.

(*a*) *Mills* v. *Fox*, 37 Ch. D. 153.

(*b*) *Edwards* v. *Warwick*, 2 P. W. 171; *Dixon* v. *Gayfere*, 17 B. 433; *Griesbach* v. *Fremantle*, 17 B. 314; *Meredith* v. *Vick*, 23 B. 559. See Prideaux's Precedents (22nd ed.), III, p. 416.

Fletcher v. Ashburner.

1. An express declaration to elect, though but slight (*c*), if it be unequivocal (*d*), may be made by parol (*e*).

Where a person entitled absolutely, or subject to a preceding life interest, to a fund to be invested in the purchase of land, bequeaths it by the description of so much money agreed to be laid out in land, this bequest will show a sufficient intention to elect to take the fund as personalty. So likewise a person absolutely entitled to land notionally converted into money, will be held to have elected to take it in its present state, by a devise thereof as all his landed property at a particular place (*f*).

2. The presumption that a person has made an election will arise from very slight circumstances (*g*). Thus, if a person keeps land for some length of time unsold, a presumption will arise that he elected to take it as land (*h*), even when legacies to be payable out of the proceeds of the realty are unpaid, if the assent of the unpaid legatees to the election be expressed, or can from their conduct be inferred (*i*), and *a fortiori* where he has actually paid off a charge on such estate (*k*).

But the presumption will not arise when land has been retained a long time unsold if one of the beneficiaries has not during that time been competent to elect to take it unsold (*l*). In *Kirkman* v. *Miles* (*m*), where the persons entitled to the proceeds to arise from the sale of land had entered upon and occupied it for two years, and neither they nor the trustees had taken any steps to sell the estate, nor had they made any requisition to the trustees for that purpose, Grant, M.R., held, " that only two years was too short to presume an election " (*n*). The presumption will be

(*c*) *Wheldale* v. *Partridge*, 8 V. 236.

(*d*) *Stead* v. *Newdigate*, 2 Mer. 531; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*e*) *Edwards* v. *Warwick*, 2 P. W. 174; *Chaloner* v. *Butcher*, 3 Atk. 685; *Pulteney* v. *Darlington*, 1 Bro. Ch. 237; *Wheldale* v. *Partridge*, 8 V. 227, 236.

(*f*) *Sharp* v. *St. Sauveur*, L. R. 7 Ch. 343; and see *Re Lord Grimthorpe*, [1908] 1 Ch. 666; [1908] 2 Ch. 675; *Re Hopkinson*, [1922] 1 Ch. 65.

(*g*) *Pulteney* v. *Darlington*, 1 Bro. Ch. 238; *Van* v. *Barnett*, 19 V. 102, 109; *Cookson* v. *C.*, 12 Cl. & Fin. 121; *Dixon* v. *Gayfere*, 17 B. 433.

(*h*) *Ashby* v. *Palmer*, 1 Mer. 301; *Crabtree* v. *Bramble*, 3 Atk. 688; *Dixon* v. *Gayfere*, 17 B. 433; *Griesbach* v. *Fremantle*, 17 B. 314; *Re Gordon*, 6 Ch. D. 531; *Re Davidson*, 11 Ch. D. 341; *Potter* v. *Dudeney*, 56 L. T. 395.

(*i*) *Mutlow* v. *Bigg*, 1 Ch. D. 385.

(*k*) *Re Davidson*, 11 Ch. D. 341.

(*l*) *Re Douglas and Powell's Contract*, [1902] 2 Ch. 296; *Re Sturt*, [1922] 1 Ch. 416, 431.

(*m*) 13 V. 338.

(*n*) See also *Cookson* v. *C.*, 12 Cl. & Fin. 121; *Brown* v. *B.*, 33 B. 399; *Parker* v. *Williams*, 15 W. R. 1006; *Re Davidson*, 11 Ch. D. 341; and see *Re Lewis*, 30 Ch. D. 654; *Re Sturt*, *supra*.

sufficient where the person entitled to the money to arise from lands to be converted, not only enters into the possession of the lands, but also takes into his custody the deeds without which the trustees could neither recover the estate, nor sell it: Thus in *Davies* v. *Ashford* (*o*), real estates were, by marriage settlement, conveyed to trustees, in trust to sell, and to hold the proceeds in trust for the husband and wife for their lives successively, remainder in trust for their children, remainder in trust for the survivor of the husband and wife absolutely; there was no child of the marriage. The husband survived his wife, and after her death got possession of the settlement and of the title-deeds, and remained in possession of them, and also of the estates, until his death. Shadwell, V.-C., held that he thereby had elected to take the estates as land. "I admit," said his Honour, "that the settlement contained a clear trust for sale, which must have been exercised unless the husband did some act which showed that he meant the trust to be at an end, and to take the estates as land. It does not distinctly appear in whose custody the title deeds originally were; but it is clear that there was a change in the possession of them and that the husband got them into his custody. Now, was not that, of necessity, a destruction of the trust; for the trustees could not have compelled the husband to deliver up the deeds, and without doing so, they could not have made any effectual sale of the estates" (*p*). In the case of land to be converted into money, Lord Hardwicke held, that a grant *of a lease*, reserving rent to the grantor, *her heirs and assigns*, was strong evidence of the intention of the grantor to elect that it should continue as land, though she could not reserve otherwise (*q*). So it has been held that a new letting to a tenant from year to year, by a lessor entitled to the proceeds of land directed to be sold, will amount to an election, upon the ground that he would have been liable to an action by the tenant if the trustees had afterwards exercised the trust for sale, supposing that they had sold the estate and that the tenant had been evicted (*r*).

Election may be presumed from circumstances. In one case

(*o*) 15 Si. 44.

(*p*) See also *Padbury* v. *Clark*, 2 Mac. & G. 298; *Brown* v. *B.*, 33 B. 399; *Sisson* v. *Giles*, 3 De G. J. & S. 614; *Potter* v. *Dudeney*, 56 L. T. 395.

(*q*) *Crabtree* v. *Bramble*, 3 Atk. 680, 689; *Mutlow* v. *Bigg*, 1 Ch. D. 385; see also *Griesbach* v. *Fremantle*, 17 B. 314.

(*r*) *Re Gordon*, 6 Ch. D. 531, 537; but see *Meek* v. *Devenish*, 6 Ch. D. 566. Cf. *Potter* v. *Dudeney*, 56 L. T. 395.

the execution of a deed by the parties interested in such sum, describing it as *moneys they were entitled to receive*, and declaring trusts for investment in *securities*, was held to be a sufficient indication of their intention, to elect to take the sum of money in its unconverted state, although the trusts of the moneys and securities were declared by reference to trusts of an instrument which assumed the conversion of the money into land (*s*).

Where the person absolutely entitled to money to be laid out in land receives the money from the trustees, he elects to take it as money (*t*), but not where he receives the income, although for a considerable time (*u*).

If trustees resist the demand of persons absolutely entitled to property to elect to take it unconverted, such persons may get an injunction to prevent the trustees selling the property, provided the necessary provisions be made for charges thereon (*x*).

8. Conversion by the Court or Third Parties.

Where conversion is rightfully made, whether by a Court of competent jurisdiction or a trustee, as a general rule, all the consequences of a conversion follow: and there is no equity in favour of the heir or any one else to take the property in any other form than that in which it is found (*y*). But if real property be wrongfully converted into personalty, or personalty into realty, the property so converted will be considered to retain its original character.

Lunatics.—When the conversion of land into money takes place by the direction of the Court in Lunacy, although the Court must be presumed to have acted rightfully and lawfully (*z*), the interests of the real and personal representatives of the lunatic are unaffected thereby (*a*); but if the conversion is made without the direction

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(*s*) *Cookson* v. *Reay*, 5 B. 22; *Cookson* v. *C.*, 12 Cl. & Fin. 125.

(*t*) *Pulteney* v. *Darlington*, 1 Bro. Ch. 238; *Trafford* v. *Boehm*, 3 Atk. 440; *Rook* v. *Worth*, 1 Ves. Sen. 461.

(*u*) *Gillies* v. *Longlands*, 4 De G & Sm. 372; *Re Pedder's Settlement*, 5 De G. M. & G. 890.

(*x*) *Meek* v. *Devenish*, 6 Ch. D. 566, 571.

(*y*) *Steed* v. *Preece*, 18 Eq. 192, 197; *Burgess* v. *Booth*, [1908] 2 Ch. 648; *Re Dodson*, [1908] 2 Ch. 638; *Re Stinson's Estate*, [1910] 1 Ir. R. 13; *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Herbert* v. *H.*, [1912] 2 Ch. 268; *Pole* v *P.*, [1924] 1 Ch. 156. But as regards an order for sale in a partition action of land in which an infant is interested, see *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284.

(*z*) *Re Smith*, L. R. 10 Ch., at p. 84.

(*a*) Lunacy Act, 1890, s. 123; and see *Re Matson*, [1897] 2 Ch. 509; *Re Alston*, [1917] 2 Ch. 226; Theob. on Lunacy, p. 365.

of the Court, but properly, then, as there are no equities between the heir-at-law and the next-of-kin, they will take the properties to which they are respectively entitled according to the character in which they find them (*b*).

In the case of a lunatic, the Court will not in general alter the state of a lunatic's property so as to affect his successors; it will, however, do so when it is for the benefit of the lunatic himself (*c*); and in dealing with the property of a lunatic this principle is continually borne in mind by the Court. But even then it will interfere only with the greatest caution, and will do nothing unnecessary or uncalled for (*d*).

Acting upon this principle, if an application were made to sell a part of the real estate of a lunatic for the payment of debts, if the Court found that the maintenance of the lunatic would be better provided for, and his advantage promoted, by disposing of a real estate, inconvenient and ill-conditioned, and that it would be for the benefit of the lunatic so to pay the debts, and keep together the personal estate, the Court would have no difficulty in making an order upon such an application (*e*).

But although the Court will not lightly change one species of property into another, it is because the lunatic on recovery may reasonably expect to find his property in the same state as when he became of unsound mind, and not because such changes might prejudice the interests of his representatives (*f*).

If the committees of a lunatic took upon themselves without leave of the Court for their own advantage to change the property of the lunatic, they would not be allowed to take advantage of their own fraud (*g*), but where the conversion is by a stranger tortiously, it seems that there will be no re-conversion as between the real and personal representatives (*h*).

Infants.—Until the passing of the Wills Act (*i*) a distinction was

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(*b*) *Steed* v. *Preece*, 18 Eq. 192; Theob. on Lunacy, p. 355.

(*c*) See *e.g.*, *Baldwyn* v. *Smith*, [1900] 1 Ch. 588, confirmation by Court of voidable purchase of land.

(*d*) *Oxenden* v. *Compton*, 2 V. 72; *Re Pares*, 12 Ch. D. 333; *Re Barker*, 17 Ch. D. 241; *Att.-Gen.* v. *Ailesbury*, 12 A. C. 672; *Re Ryder*, 20 Ch. D. 514; *Re Tugwell*, 27 Ch. D. 309; *Re Gist*, [1904] 1 Ch. 398; *Re Douglas & Powell's Contract*, [1902] 2 Ch. 296; *Re Alston*, *supra*.

(*e*) *Per* Eldon, C., in *Ex p. Phillips*, 19 V. 124.

(*f*) *Ex p. Annandale*, Amb. 81; *Awdley* v. *A.*, 2 Vern. 192; *Ex p. Bromfield*, 1 V. 463.

(*g*) *Ex p. Ludlow*, 2 Atk. 407; *Ex p. Bromfield*, 1 V. 462; *Awdley* v. *A.*, 2 Vern. 192; so in the case of *Re Badcock*, 4 My. & C. 440.

(*h*) Anon., cit. 1 V. 462.

(*i*) 1 Vict. c. 26.

made between the case of an adult lunatic and that of an infant: an adult lunatic on his recovery always had the same power of disposition both over his real and personal property; but an infant, although unable to devise real estate whilst under twenty-one, could bequeath personal estate after attaining seventeen years, or even, it seems, after attaining fourteen (*k*). The Court, therefore, would not convert his personalty into realty, because that would deprive him of a power of disposition which the law gave to him over personalty; nor would it convert realty into personalty, because by so doing a power would have been conferred upon him contrary to the policy of the law (*l*). The Wills Act took away from an infant this general testamenary power over personal estate; but the practice of not altering unnecessarily the nature of an infant's property is still maintained. Where the Court is satisfied that it is for the benefit of an infant that property belonging to him should be converted it will order a mortgage or sale, as, for instance, in the case of repairs (*m*). Even in the above cases (*n*) the conversion would be *sub modo* only, and perhaps the rule laid down in *Re Badcock* (*o*) with regard to a lunatic's estate will be held applicable to an infant's, namely, that personalty may be laid out in ordinary repairs, but if a large outlay is required, the money expended will retain in equity its character of personalty (*p*). Following the old distinction, however, the proceeds of timber cut on the estate of an infant would, it seems, be considered as part of the realty (*q*).

Moreover, where the personal estate of the infant has been applied in paying off a charge or redeeming a mortgage, it has been ordered that it shall be considered as personal estate for the benefit of the infant (*r*).

The reason for the distinction, running through the decisions,

(*k*) *Winchelsea* v. *Norcliffe*, 1 Vern. 437; *Ex p. Phillips*, 19 V. 124; Simpson (4th ed.), p. 11 n., 224.

(*l*) *Ex p. Phillips*, 19 V. 122; *Witter* v. *W.*, 3 P. W. 99; *Rook* v. *Worth*, 1 Ves. Sen. 461; *Sergeson* v. *Sealey*, 2 Atk. 413; *Ware* v. *Polhill*, 11 V. 278; *Inwood* v. *Twyne*, 2 Eden, 152.

(*m*) *Ex p. Grimstone*, Amb. 708; *Inwood* v. *Twyne*, 2 Eden, 148; *Re Jackson*, 21 Ch. D. 786; *Re Household*, 27 Ch. D. 553; *Conway* v. *Fenton*, 40 Ch. D. 512.

(*n*) *Ex p. Grimstone*, *supra*; *Inwood* v. *Twyne*, *supra*.

(*o*) 4 My. & C. 440; *Re Gist*, [1904] 1 Ch. 398.

(*p*) Simpson on Infants (4th ed.), p. 224. Cf. *Hood* v. *Bridport*, 16 Jur. 560.

(*q*) *Tullit* v. *T.*, Amb. 370, 1 Dick. 322; *Ex p. Phillips*, 19 V. 124; but see *Ex p. Bromfield*, 3 Bro. Ch. 516; and *Dyer* v. *D.*, 34 Beav. 504.

(*r*) *Ex p. Bromfield*, 3 Bro. Ch. 516; *Tullit* v. *T.*, 1 Dick. 323; but see *Ex p. Grimstone*, Amb. 708; *Zoach* v. *Lloyd*, cited 2 Vern. 192; *Dennis* v. *Badd*, cited *ibid.* 193; *Winchelsea* v. *Norcliffe*, 1 Vern. 436; *Ware* v. *Polhill*, 11 V. 278; *Att.-Gen. v. Ailesbury*, 12 A. C. 672.

between the conversion of the property of infants and lunatics having been removed, the leaning of the Court appears to be to simplify the law by assimilating the case of infants to that of lunatics (*s*). An order of the Court rightfully made for the sale of real estate operates as a conversion from the date of the order (*t*). Accordingly where the Court for the benefit of an infant converts property of one description into property of another description, it will devolve according to its character at the death of the infant (*u*).

Conversion for Particular Purpose.—When realty has been converted by the Court or trustees for a particular purpose which does not exhaust the whole proceeds of the sale, the surplus, as a rule, is to be taken as personalty. In *Steed* v. *Preece* (*x*), Jessel, M.R., held that if a conversion is rightfully made, whether by the Court or a trustee, all the consequences of a conversion must follow; and the heir or any one else must take the property in the form in which it is found unless there be any equity in favour of the heir, or any one else, for re-conversion (*y*).

The judgment itself may of course make a special provision, as where a decree ordering real estate *devised in strict settlement* to be sold for payment of debts, directed that if more were sold than was sufficient for that purpose the surplus should be laid out in land to be settled to the same uses as the devised estate (*z*).

Sales Under Statute.—Where the sale of property belonging to persons under disability was directed by the Court under the Partition Act, 1868, there was an equity for reconversion under the Settled Estates Act, 1877, ss. 34, 35, 36, which are incorporated in that Act (*a*).

Where money is paid into Court, the produce of real estate converted by compulsory powers under Acts of Parliament, as under the 69th section of the Lands Clauses Consolidation Act, it in

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(*s*) Lewin (12th ed.), 1245—7.

(*t*) *Burgess* v. *Booth*, [1908] 2 Ch. 648 (C. A.); *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Pole* v. *P.*, [1924] 1 Ch. 156.

(*u*) See *Dyer* v. *D.*, 34 B. 504.

(*x*) 18 Eq. 192; *Burgess* v. *Booth*, [1908] 2 Ch. 648 (C. A.); *Fauntleroy* v. *Beebe*, [1911] 2 Ch. 257; *Pole* v. *P.*, [1924] 1 Ch. 156.

(*y*) *Foster* v. *F.*, 1 Ch. D. 588; *Batteste* v. *Maunsell*, 10 Ir. R. Eq. 97; *Re Barker*, 17 Ch. D. 241. But see *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284.

(*z*) *Fellow* v. *Jermyn*, W. N. (77) 95; and see *Att.-Gen.* v. *Ailesbury*, 12 A C. 672.

(*a*) The provisions incorporated were in the S. E. Act, 1856, which was replaced by the Act of 1877. *Foster* v. *F.*, 1 Ch. D. 588; *Mildmay* v. *Quicke*, 6 Ch. D. 553; and see *Re Dodson*, [1908] 2 Ch. 638; *Herbert* v. *H.*, [1912] 2 Ch. 268; *Re Barker*, 17 Ch. D. 241; *Hopkinson* v. *Richardson*, [1913] 1 Ch. 284.

general remains in Court subject to the rights of the parties interested in it to have it re-invested in land (*b*), and is to be considered as money or personal estate in Court, subject to a trust to be invested in land, and therefore *impressed with the quality of real estate* (*c*), until some act is done by the owner showing his election to take it as personalty (*d*). But the accumulations will be personal estate (*e*).

(*b*) See, as to payment out to party becoming absolutely entitled, *Re Hobson's Trusts*, 7 Ch. D. 708; *Re Smith*, 40 Ch. D. 386; *Re Morgan*, [1900] 2 Ch. 474.

(*c*) *Re Stewart*, 1 Sm. & G. 32, 39; *The M. Ry. Co.* v. *Oswin*, 1 Coll. Ch. R. 80; *Re Taylor*, 9 Ha. 596.

(*d*) *Re Horner's Estate*, 5 De G. & Sm. 483; *Re Stewart*, 1 Sm. & G. 39.

(*e*) *Dixie* v. *Wright*, 32 B. 662.

ACKROYD *v.* SMITHSON (*a*).

Lincoln's Inn Hall, 1780. 1 Bro. Ch. 503.

Resulting Trust on Failure of the Purposes for which Conversion has been directed.

Testator gave several legacies, and ordered his real and personal estate to be sold, his debts and legacies to be paid out of the proceeds arising from the sale, and the residue thereof he gave to certain legatees, in the proportion of their legacies. Two of the residuary legatees died, living the testator. These shares are lapsed; and so far as they are constituted of personal estate, shall go to the next-of-kin, and so far as they are constituted of real estate, to the heir-at-law.

Christopher Holdsworth bequeathed pecuniary legacies to certain persons, all which, together with other legacies given by his will, he directed to be paid at the end of six months after his decease; and the said testator gave all his real estate not thereinbefore devised, and all his personal estate whatsoever, unto the defendants Smithson and Ibbetson, their heirs, executors, administrators, and assigns, *in trust that they should, as soon as convenient after his decease, sell all his said messuages, etc., for such price or prices as could be got for the same, and thereby to convert such real and personal estate so to them devised, and every part thereof, into ready money*, and by and out of the money arising by such sale to pay all his debts, legacies, and funeral expenses, and charges of proving his will; and after payment thereof, in trust out of such monies to arise as aforesaid, to pay all legacies and annuities thereby bequeathed, at the time and in the manner thereby directed; and if, after such payments made, and putting out of the funds,

(*a*) This report was copied by Mr. Brown from the notes of Lord Eldon—from Lord Redesdale's MSS. The importance of the decision in this case, like that of the decision in *Fletcher* v. *Ashburner*, has been much reduced by recent legislation.

as thereby directed, for raising the annuities thereby given, and indemnifying his trustees from all charges, expenses, and loss which might attend the carrying the trusts of his will into execution, there should remain an overplus in the hands of the trustees, which he apprehended there would be to a considerable amount, he directed that they and the survivors of them should, within six months after the same should be ascertained, pay the same unto his said legatees, in proportion to their several and respective legacies therein to them bequeathed; and the testator thereby willed and devised that two several sums of £250 each, which he had therein directed to be put out on securities in the names of his trustees, and the interest arising therefrom to be respectively paid to M. Thackeray and R. Gaunt during their respective lives, should, upon the several deaths of them, the said M. Thackeray and R. Gaunt, be paid in the like proportions unto them his said several and respective legatees.

Benjamin Wright and Mrs. Molyneaux, two of the said legatees, died in the lifetime of the testator.

The bill was filed by the next-of-kin of the testator against the trustees, the surviving legatees and the heir-at-law claiming the legacies given to the deceased legatees, their shares in the overplus, and in the two sums of £250 as lapsed and become part of the personal estate of the testator.

The cause came on at the Rolls, July 10, 1778, when his Honour (Sir Thomas Sewell), being of opinion that the surviving legatees took the whole residue, in proportion to their several legacies, dismissed the bill without costs.

From this decree the plaintiffs appealed to Thurlow, L.C., and, the cause coming on to be heard before his Lordship,

Mr. Kenyon attempted to support the decree.

But Thurlow, L.C., being clear (without hearing much argument) that this was a tenancy in common in the residue, and that, therefore, the shares of the legatees who died in the testator's lifetime were undisposed of, said the only question

Ackroyd v. Smithson.

was, whether such shares belonged wholly to the next-of-kin or to the heir-at-law.

The Attorney-General (*b*), Mr. Madocks, and Mr. Selwyn (for the plaintiffs, the next-of-kin) contended that the testator had converted his real estate into money out and out; that he had mixed two funds, and made all personal estate; that the cases, therefore, of *Mallabar* v. *M.* (*c*), and *Durour* v. *Motteux* (*d*), must govern the decision here, and that the blending the funds distinguished this case from that of *Digby* v. *Legard* (*e*). Mr. Selwyn mentioned the cases of *Flanagan* v. *F.* (*f*), *Fletcher* v. *Ashburner* (*g*), and *Ogle* v. *Cook* (*h*).

Lord Chancellor Thurlow thought the two former cases did not apply, but being in general of opinion with the counsel for the next-of-kin, asked the counsel for the heir-at-law upon what grounds they could support his claim.

Mr. Scott (*i*), for the heir-at-law, said they claimed on his behalf such interest in the monies produced by the sale of the testator's real estates as the deceased residuary legatees would have been entitled to, if they had survived the testator; or so much of their shares of the overplus, now in the events which have happened, undisposed of, as is constituted by the produce of the testator's real estate. That the heir-at-law is entitled to every interest in land not disposed of by his ancestor, is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing; his intention has certainly been equally unpropitious to his next-of-kin; but it is not enough that the testator did not intend that his heir should take: he must make a disposition in favour of another; if he

(*b*) Alexander Wedderburne, Esq., afterwards Earl of Rosslyn.
(*c*) Cas. t. Talbot, 79.
(*d*) 1 Ves. Sen. 320.
(*e*) Cited 1 Bro. Ch. 501.
(*f*) Cited 1 Bro. Ch. 500.
(*g*) 1 Bro. Ch. 497, *ante*.
(*h*) 1 Bro. Ch. 501.
(*i*) Afterwards Earl of Eldon, from whose notes this argument is taken.

has not actually disposed of all his real estate, if he has not made an universal heir, the law will give such part of his real estate as he has not actually and eventually disposed of, even against his intention, and *a fortiori* in a case where he has expressed no intention, to the *hæres natus*. If the interest of the deceased legatees had been an interest in the produce of mere real estate, not blended with the produce of personal estate, it has been admitted, upon both hearings, that the benefit of the lapsed devises would, according to the case of *Digby* v. *Legard*, and the principle of the case of *Emblyn* v. *Freeman* (*k*), and of many others, have accrued to the heir-at-law. It is admitted, and cannot be denied, that where a testator directs real estate to be sold for special purposes, if any of those purposes become incapable of taking effect, the heir-at-law shall take; because there is an end of the disposition when there is an end of the purposes for which it was made; but it is contended here the testator had not a special intention, but that he meant the produce of his real estate should be considered as personal estate; that he intended to convert it out and out; that he has not kept the funds distinct, but that he has blended them so as to be incapable of being distinguished, and that the cases, therefore, of *Durour* v. *Motteux*, and *Mallabar* v. *M.*, are authorities in point, that the whole fund is personal. We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all questions between real and personal representatives. But we insist that, if he has not actually and eventually so decided, they, upon whom the law casts the title to personal estate, can no more claim in a Court of equity money arising from the sale of land than the heir can claim property admitted to be of a personal nature. As to the question of fact, whether he meant that, in some event only, or that, in all events, the produce of his real estates should be considered as personalty, we admit that, in favour of his residuary legatees, he meant to convert the whole into personalty, in case all his residuary legatees should eventually take the whole; but we contend that he has intimated no intention as to that part of

(*k*) Pr. Ch. 541.

the produce, as to which his disposition in the event which has happened, has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property which his legatees were to take; but, as to such part of the property as, in the event, they have not taken, he has not determined upon its nature; he never meant to determine upon its nature, as between his heir-at-law and his personal representative or next-of-kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but to say he has made it all personal property, and that therefore the law must give it to the next-of-kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which have not occurred, for the sake of proving a similar intention, if circumstances happened directly contrary to those with relation to which only the testator framed his intention. To argue from what the testator intended with respect to residuary legatees, by way of proving that he intended the same in favour of his next-of-kin, is to reason from a case in which intention is expressed, to prove a like intention in a case which supposes the absence of intention; though the testator, therefore, intended that his legatees, if they had lived, should take their respective shares of such part of the general surplus as was produced by the sale of the real estates as money, he has not declared any intention relative to its nature, in case that particular intent of his should be disappointed. In the event, therefore, which has happened, it is so much money undisposed of, arising from the sale of lands. Such money in this Court is land, and as such the heir claims it. Suppose all the fifteen legatees had died in the lifetime of the testator, would it not have been competent to the heir-at-law to have insisted in equity that no sale should be made of the real estate? Would it have been possible to contend that, because the testator had blended the funds, in order to make a disposition which never took effect, and without a view to any other given circumstances, that he had therefore blended them, if, in the event, he had made no disposition; that, because he had made

the real estate personal, to give it to his residuary legatees, and to disappoint his heir, whether his residuary legatees did or did not, in the event, take the benefit of that disposition? The fact of his having blended the funds proves not a mere inattention, not mere indifference to the interest both of his next-of-kin and his heir-at-law, but it proves a purpose hostile to both. Can that fact, then, be a ground from whence to infer that, in a change of circumstances, he had a purpose of kindness and bounty to the next-of-kin, and adverse to the interest of the heir only? The reason of the intention ceasing, the intention should be taken to have ceased. The testator meant to change the legal qualities of his property, when he meant to alter the disposition which the law would make of his property; but if, in the event, the law was to make the disposition of any part of the property, he meant, for aught that appears to the contrary (and something must appear to the contrary, to defeat the claim of the heir), that the law which made the disposition should decide on the qualities of the property of which it was to dispose. If, then, in case all the residuary legatees had died, the heir could have prevented a sale, is it to be said that, because a sale must be made, he shall not have that part of its produce which the objects of the testator's bounty cannot take? It is not true that where it is necessary that a sale should be made, to effectuate the testator's purposes which are capable of taking effect, that such sale will convert the nature of that part of its produce which cannot be applied according to the testator's intention. He then cited, distinguished and commented upon the following cases: *Emblyn* v. *Freeman* (*l*), *Digby* v. *Legard* (*m*), *Mallabar* v. *M.* (*n*), *Durour* v. *Motteux* (*o*), *Cruse* v. *Barley* (*p*), *Flanagan* v. *F.* (*q*), *Scudamore* v. *S.* (*r*), *Ogle* v. *Cook* (*s*).

Lord Chancellor Thurlow reversed the decree, and directed an account to be taken of the personal estate, and the money

(*l*) Pr. Ch. 541.
(*m*) Cited 1 Bro. Ch. 501.
(*n*) Cas. t. Talbot, 79.
(*o*) 1 Ves. Sen. 320.
(*p*) 3 P. W. 20.
(*q*) Cited 1 Bro. Ch. 500.
(*r*) Pr. Ch. 513.
(*s*) As to which see *Collins* v. *Wakeman*, 2 V. 686.

arising from the sale of the real estate, and that the share of the deceased legatees in the overplus should be divided between the next-of-kin and the heir; that is, so much of those shares as was constituted of the personal estate to the next-of-kin, and so much as was made up of the produce of the real estate to the heir.

He said that he fully approved the determination in *Digby* v. *Legard*. That he used to think, when it was necessary for any purposes of the testator's disposition to convert the land into money, that the undisposed money would be personalty; but the cases fully proved the contrary. It would be too much to say that, if all the legatees had died, the heir could, as he certainly might, he said, prevent a sale, and yet to say that, because a sale was necessary, the heir should not take the undisposed part of the produce. The heir must stand in the place of the residuary legatees who died, as to the produce of the real estate. He said he approved the distinctions made on behalf of the heir, and decreed as before.

NOTES.

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1. Resulting Trusts on Failure of Disposition of Money to arise from Sale of Land.

Since the case of *Ackroyd* v. *Smithson*, so celebrated for the elaborate argument of Mr. Scott, afterwards Lord Eldon, it has never been doubted, that, where a testator directs a real estate to be sold, and the produce of the sale to be applied for a purpose which either wholly or partially fails, the undisposed-of beneficial interest will result as real estate, although the land may have been actually converted into money. Where a testator means, with regard to a particular purpose, to convert his real estate into personal, if that

purpose cannot be served, the Court will not infer an intention to convert the estate for any other purpose not expressed (*t*).

The same result follows where money arising from land directed to be sold is given over on an event which does not happen. Thus in *Jessopp* v. *Watson* (*u*), a testator directed a *mixed fund*, composed of the produce of his real and personal estate, to be applied to certain specified purposes, and the residue to be divided among his children, or child, at twenty-one, if sons, and twenty-one or marriage, if daughters, and if there was no child who should become entitled under the trusts, to such person as he should by his codicil appoint. The testator died without having made a codicil, leaving an only daughter, his heiress-at-law, who died under twenty-one, intestate and unmarried. Leach, M.R., held, that so much of the residuary fund as was constituted of real estate descended to the heiress, and that so much as was constituted of personal property went to the next-of-kin (*x*).

So, where land is directed to be converted into money, and the whole, or part, is given for a purpose which fails on account of illegality, the whole or part which, on this account, remains undisposed of, results as real estate. As, for instance, where money, to arise from the sale of land, is limited, so that the bequest is void, as violating the rule against perpetuities (*y*). In *Eyre* v. *Marsden* (*z*), accumulations were directed to be made for more than twenty-one years from the death of the testator out of the income of his residuary real estate to be converted into money. The direction was void under the Thellusson Act (*a*), as to the excess of the accumulation over the twenty-one years, and the excess accumulations were held to result to the heir-at-law. "It happens," observes Langdale, M.R., "that there is a failure of the testator's intent. The income of the money arising from the sale of the real estates cannot be allowed to accumulate, and applied as the testator meant. The purposes of the will, as far as they can be lawfully carried into effect, do not exhaust the whole beneficial interest arising out of the real estate, and I think that the heir is entitled to the unexhausted interest."

(*t*) *Per* Eldon, C., *Hill* v. *Cock*, 1 V. & B. 175; *Bective* v. *Hodgson*, 10 H. L. Cas. 656.

(*u*) 1 My. & K. 665.

(*x*) See also *Fitch* v. *Weber*, 6 Ha. 145; *Roberts* v. *Walker*, 1 Russ. & M. 752.

(*y*) *Burley* v. *Evelyn*, 16 Si. 290; *Buchanan* v. *Harrison*, 1 John. & H. 662.

(*z*) 2 Keen, 564; and see *Wildes* v. *Davies*, 1 Sm. & G. 475; *Halford* v. *Stains*, 16 Si. 488; *Simmons* v. *Pitt*, 8 Ch. D. 978.

(*a*) 39 & 40 Geo. 3, c. 98.

Ackroyd v. Smithson.

Where a trust for sale is bad as not limited to take effect within the period prescribed by the rule against perpetuity, but the persons entitled to the proceeds of sale are all ascertainable within the period, the trust for sale is disregarded and the beneficiaries take the property as real estate (*b*).

An express direction that the proceeds of the sale of real estate shall be deemed personalty will not prevent the operation of the rule; for however absolute such direction for conversion may be, it will be construed to extend to the purposes of the will only (*c*). Thus, in *Fitch* v. *Weber* (*d*), a testatrix devised and bequeathed her real and personal estate, in trust as to the real estate for sale as soon after her decease as conveniently could be, and declared that the trustees should stand possessed of the proceeds of the sale, *as a fund of personal and not real estate; for which purpose she declared such proceeds, or any part thereof, should not in any event lapse or result for the benefit of her heir-at-law*; and, after giving legacies, the testatrix directed her trustees to pay and apply the residue of her estate and effects as she should by any codicil to that her will direct or appoint. The testatrix made no codicil. Wigram, V.-C., after an elaborate examination of the authorities, held, that the heir-at-law was entitled to the proceeds of the real estate undisposed of by the will.

2. Resulting Trusts when Money is directed to be laid out in Land upon Uses which wholly or partially fail.

The principle upon which *Ackroyd* v. *Smithson* was decided, applies also to the converse case of money directed to be laid out in the purchase of real estate, devised to uses which partially fail, as well as those which wholly fail to take effect; for the undisposed-of interest in the money or the estate, if purchased with the money, will result as personal estate. In *Cogan* v. *Stevens* (*e*), the testator ordered that £30,000 should be laid out immediately by his executors in the purchase of an estate or estates in the county of Devon or Cornwall, the income of which should belong to his widow during her life, and after her decease to certain persons (all of whom died

(*b*) *Goodier* v. *Edmunds*, [1893] 3 Ch. 455; *Re Daveron*, *ibid.* 421; *Re Appleby*, [1903] 1 Ch. 565; *Re Garnham*, [1916] 2 Ch. 413.

(*c*) See *Collins* v. *Kakeman*, 2 Ves. 686; *Amphlett* v. *Parke*, 2 Russ. & M. 221; *Taylor* v. *T.*, 3 De G. M. & G. 190, overruling *Phillips* v. *P.*, 1 My. & K. 649; *Robinson* v. *London Hospital*, 10 Ha. 19; *Ellis* v. *Bartrum*, 25 B. 110; *Bedford* v. *B.*, 35 B. 584.

(*d*) 6 Ha. 145.

(*e*) 1 B. 482 (n.).

Ackroyd v. Smithson.

during the life of his widow, without issue), in tail, with remainder to a charity. The money was not laid out, and the gift to the charity being void under the then law of mortmain (*f*), it was held by Lord Cottenham, that the next-of-kin, and not the heir-at-law of the testator, were entitled to the fund. "The result of the whole authorities," said his Lordship, "seems to be, that, before *Ackroyd* v. *Smithson*, no distinction was recognised between the doctrine as applicable to a conversion of money into land, or land into money: that, as to both, an opinion prevailed that when a conversion was necessary, and part of the object failed, the unappropriated proceeds belonged to that representative on whom the law cast that description of property in which such proceeds were found to exist. This, as to land converted into money, was corrected in *Ackroyd* v. *Smithson;* * * * and as I am not bound by any of the authorities to maintain a distinction which was not originally supposed to exist, and which cannot be maintained in reason, and which, therefore, if maintained, would be a reproach to the law as it stands, I feel myself fully justified in preserving the uniformity of the rule, as applicable to the two cases, by deciding against the claim of the plaintiff; and I may be allowed to express some satisfaction in finding I am not compelled by authority to hold that any heir should take, as such, what had no inheritable quality, but was pure personal estate, at the time of the ancestor's death, or that, as devisee, he should take that which was never destined for him, but was in most unquestionable terms given to another" (*g*).

3. How the Heir and Next-of-kin take Property directed to be converted.

Conversion absolute—Partial Failure of Objects of.—Where an absolute conversion of land is directed for the *general purposes of the will*, and some of these purposes fail, yet, the conversion being effectual, the surplus proceeds of the land sold, and the unsold land, both result to the heir *as personal estate*. In *Re Richerson* (*h*), a testator devised his real estate upon trust for sale, and directed that the proceeds should form part of his residuary personal estate, which he bequeathed to a class which failed. In 1890 the

(*f*) See now the Mortmain and Charitable Uses Act, 1891, s. 7.

(*g*) See also *Hereford* v. *Ravenhill*, 1 B. 481; *Re Hopkinson*, [1922] 1 Ch. 65.

(*h*) [1892] 1 Ch. 379. Cf. *Re Dyson*, [1910] 1 Ch. 750; *Re Alston*, [1917] 2 Ch. 226; *Re Hopkinson, supra.*

trusts came to an end. Part of the land was sold, part was unsold. The heir had died in 1872 intestate. Chitty, J., held that the proceeds of the real estate sold, and the realty unsold, both went to the personal representative of the heir; and probate duty was payable upon the land unsold (*i*).

Conversion absolute—Entire Failure of Objects of.—If there is a total failure of the objects for which conversion was directed, the heir will take the estate as realty (*k*); and a sale unnecessarily made by trustees will not vary the rights of the parties (*l*).

Conversion directed for Particular Purpose.—Where a conversion is directed not absolutely, for all the purposes of the will, but for a particular purpose, such as payment of debts, all that is not required for that purpose results as land, as if the conversion had entirely failed (*m*).

Personal Estate.—The same principles apply in the case of personalty directed to be converted. If it is directed to be laid out in land for *the general purposes of the will*, it descends, if the trusts partially fail, *as real estate* (*n*), whether actually so invested or not (*o*).

4. When a Residuary Devise or Bequest comprehends Property which would otherwise have resulted to the Heir or Next-of-kin.

Unless an intention is expressed in, or can be inferred from the whole will, that the proceeds of the sale of real estate undisposed of is to form part of the testator's personal estate, it will not pass under a residuary bequest.

Thus in *Maugham* v. *Mason* (*p*), a testator devised freehold chambers to trustees upon trust to sell, and to apply the money arising by such sale toward payment of legacies, and the rents, until sale, to be applied to the same uses; and, after giving some pecuniary and specific legacies, as to the rest, residue, and remainder of his personal estate, after payment of his debts, legacies, and funeral expenses, he bequeathed the same to his trustees, upon

(*i*) *Att.-Gen.* v. *Lomas*, L. R. 9 Ex. 29.

(*k*) *Smith* v. *Claxton*, 4 Madd., at p. 493; *Re Dyson, supra; Re Alston, supra; Re Hopkinson, supra.*

(*l*) *Davenport* v. *Coltman*, 12 Si. 610; *Cooke* v. *Dealey*, 22 B. 196; cf. *Bowra* v. *Rhodes*, 31 L. J. Ch. 676; *Re Richerson*, [1892] 1 Ch., at p. 383.

(*m*) *Wright* v. *W.*, 16 V. 188; *Re Richerson*, [1892] 1 Ch. 379.

(*n*) *Curteis* v. *Wormald*, 10 Ch. D. 172; and cf. *Cogan* v. *Stevens*, 1 B. 482.

(*o*) See *Re Richerson*, [1892] 1 Ch., at p. 384.

(*p*) 1 V. & B. 410.

trust to convert all the said residue into money, and to lay out the same in the purchase of freehold property, to be settled as therein mentioned. The executors paid all the debts, funeral expenses, and legacies, out of the personal estate, not making sale of the real estate. Grant, M.R., held, that the real estate, after payment of legacies, which were a primary charge upon the personalty, resulted to the heir-at-law, and did not pass under the residuary bequest. "The observation," said his Honour, "is perhaps minute, that the money, produced by the sale of the real estate, could not with propriety be spoken of as personal property to be converted into money; at most, however, this is a general bequest of the residue of his personal estate; and the question is, what was meant to be included under that description. Properly speaking, nothing is the personal estate of a testator that was not so at his death. He may certainly so express himself as to show that something else was intended; but where there is nothing but a direction to sell land, with application of the money to *a particular purpose*, and a subsequent bequest of the rest and residue of the *personal* estate, I know of no case in which it has been held that the surplus, after the particular purpose is answered, forms part of the personal estate, so as to pass by the residuary bequest. *The mere disposition of the residue of personal estate can never solve the question, what is personal estate.* The clause may be so conceived as to show the sense in which those words are used; but here is nothing more than those words, unaccompanied with anything explanatory of the sense in which they were used" (*q*).

Where, however, a testator expressly declares, that the money arising from the sale of real estate shall be considered as part of the personalty, it will pass under a general residuary bequest of personalty in the same will (*r*), and it is liable to the trusts which attach to such residuary personal estate, and to the legal incidents affecting it (*s*); and the intention that the proceeds of the sale of real estate should pass under a residuary bequest of personal estate, may be inferred from expressions in the will irresistibly leading to such a conclusion: and the blending of the real with the personal

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(*q*) See also *Berry* v. *Usher*, 11 V. 87; *Kellet* v. *K.*, 3 Dow, 248; *Collins* v. *Wakeman*, 2 V. 683; *Robinson* v. *London Hospital*, 10 Ha. 27; *Re Cameron*, 26 Ch. D. 19; *Dixon* v. *Dawson*, 2 S. & S. 327; *Collis* v. *Robins*, 1 De G. & Sm. 131; *Hamilton* v. *Foot*, 6 Ir. R. Eq. 572.

(*r*) *Kidney* v. *Coussmaker*, 1 V. 436.

(*s*) *Bright* v. *Larcher*, 3 De G. & J. 156; *Field* v. *Peckett*, 29 B. 568.

estate has been considered as furnishing an indication of such intention (*t*).

Failure of Gifts of Money out of Proceeds of Sale of Real Estate.—It has always been held that a will as to personalty speaks at *the time of death of the testator*, so far as regards the property passing under a bequest (*u*). Before the Wills Act (*x*) it was otherwise as to real estate, as to which a will spoke only as at the time it was made (*y*).

In *Amphlett* v. *Parke* (*z*), a testatrix gave her real estates upon trust to be sold, and directed the moneys to arise from such sale, to be considered and taken *as part of her personal estate;* she then directed, that, out of the moneys to arise from such sale, and out of all *other* her personal estate, certain pecuniary legacies should be paid; and bequeathed all the residue of her personal estate, and of the moneys arising from the sale of her real estates, upon trust for two persons and their children. Some of the pecuniary legacies having lapsed, it was held by Lord Brougham, reversing the decision of Sir John Leach, that the conversion of the real estate into personal, directed by the will, *was not absolute, but partial only*, for the purpose of making good the pecuniary legacies, and that such of those legacies as had lapsed, in so far as they were payable out of the produce of real estate, had lapsed for the benefit of the heir-at-law. "The rule," observed his Lordship, "which I have stated to be extracted from all the cases is that you must clearly prove that the heir-at-law is excluded; that the words prevent the possibility of considering anything to be left as a resulting trust for him; and that the burden of such proof lies upon those who claim in opposition to him. It is not at all inconsistent with that rule, but rather flows from it, and I agree in holding, that a testator may provide, not only that the undisposed residue, which is strictly personal, shall go to the residuary legatee, but that all lapsed legacies, of whatever nature, shall also go to him; and that, if it is clear, therefore, from express words, that he gave him the lapsed legacies that were to be raised by the sale of real property, and failed in consequence of lapse, mortmain, or any other cause;

(*t*) See *Court* v. *Buckland*, 1 Ch. D. 605; *Singleton* v. *Tomlinson*, 3 A. C. 404; and cf. *Re Gibbs*, [1907] 1 Ch. 465.

(*u*) See *Bullock* v. *Bennett*, 1 K. & J. 315; 7 De G. M. & G. 283; *Re Chapman*, [1904] 1 Ch. 431.

(*x*) 1 Vict. c. 26.

(*y*) Jarman (6th ed.), 778; *Jones* v. *Mitchell*, 1 S. & S. 290.

(*z*) 2 Russ. & M. 221. See Jarman (6th ed.), 784.

if he says, for instance, 'I give all the lapsed legacies as parcel of my residue, to the residuary legatee,' *cadit quæstio*; there is no doubt he may; and if he can do it by express words, he can do it by plain and obvious intention to be gathered from the whole instrument. If you once arrive at the conclusion, that the testator has displaced the heir, then, of course, the lapsed fund falls into the residue by express intention."

It will be borne in mind that by the 25th section of the Wills Act it is enacted "that unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail, or be void, by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law, or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will."

Residuary Legatee.—When the proceeds of the sale of real and personal estate are made a mixed fund, the context of the will may pass surplus proceeds to the residuary legatee (*a*), and where the conversion is absolute for the general purposes of the will, the residue of converted realty goes to the residuary legatee (*b*).

Charges and Exceptions.—A sum expressly excepted out of the produce of sale (*c*), but not attempted to be disposed of, belonged to the heir, but since the Wills Act it would go to the residuary devisee. But if the devise to a particular person or for a particular purpose is intended to be a charge only, as distinguished from an exception, the failure of the particular devise will enure for the benefit of the specific devisee (*d*).

(*a*) *Evans* v. *Crosbie*, 15 Si. 602; *Wildes* v. *Davies*, 1 Sm. & G. 475.
(*b*) *Singleton* v. *Tomlinson*, 3 A. C. 404; cf. *Gethin* v. *Allen*, 23 L. R. Ir. 236.
(*c*) *Collins* v. *Wakeman*, 2 V. 683.
(*d*) See Jarman (6th ed.), p. 786; *Carter* v. *Haswell*, 26 L. J. Ch. 576.

DONATIO MORTIS CAUSA.

WARD *v.* TURNER (*a*).

1752. 2 Ves. Sen. 431.

Donatio Mortis Causa.

Delivery necessary to donations *mortis causa*; but the delivery of receipts for South-Sea Annuities is not sufficient, though strong evidence of the intent.

The end of the bill was to have a transfer of £600 New South-Sea Annuities made to the plaintiff, as executor of John Mosely, and to have certain specific parts of the personal estate of William Fly, dead, intestate, delivered or made over to the plaintiff. Another prayer of the bill was to have an account of what was due to Mosely for services performed to Fly, against whose estate this demand was made.

The case the plaintiff made was this: he was executor of Mosely, who was related to Fly by affinity, having married his aunt; that Fly had great obligations to Mosely, who took care of him in his infancy; and at his house Fly used to come from school when it broke up: and afterward, Mosely, who, in the latter part of his life, appeared to be in very mean circumstances, lived with Fly as his servant until Fly's death; had his victuals there; performed services to him; and had now and then a shilling given him; from thence Fly made profession of a strong intent to do for him at his death, and had great kindness for him; in pursuance of which, as Fly drew near his end, being in a very bad state of health, during that time he made Mosely several donations *mortis causa* in prospect of death. Four times were fixed on by the witnesses, of which several were examined in the cause, speaking of actual gifts and declarations supporting

(*a*) S. C. 1 Dick. 170.

them. First, January 18, 1746, which was spoken to be by the porter of Furnival's Inn. The second, February 6, 1746, which was the principal proof relied on by the plaintiff to support the gifts of these annuities, and was proved by Fly's barber; who being sent for by Fly found Mosely with him, and no other; and swore to the particular words used, and declarations made; that Fly said to him, *viz.*: "I intend to give him (speaking of Mosely) Longford estate for his life; but I have considered of it; and that which is worth £40 a year to another is not worth so much to him; for if the tenants wanted an abatement for repairs, he would allow it; and, therefore, I will do better for him." That thereupon Fly went to his escritoir, and taking three papers said, "I give you Mosely these papers, which are receipts for South-Sea Annuities, and will serve you after I am dead." The third, February 23, which was proved by one who swore that in his presence Fly said, "Mosely, I give you all the goods and plate in this house." Fourthly, March 3, by the said barber, who swore that Fly declared to him, and to another person, who only were present, that he gave to Mosely all his household goods, money, arrears of rent, and everything that should be found in his house, except his sword, gun, and books; and that this together with those three receipts would make £2,000: that he wished a gentleman of his acquaintance had his sword and gun, but all the rest he gave to Mosely. He died in April following.

Argument for the plaintiff.—These were argued to be so many declarations of bounty, supported by so many witnesses at different times. Two questions arose: first, Whether in fact these things were given? secondly, Whether properly given in point of law?

Argument for the defendant.—On the part of the defendant, administrator of Fly, there was no evidence to impeach the evidence of the gift, but to invalidate it to a certain degree, principally from the behaviour of Mosely after death of Fly, as not like one who thought he had a right to these dónations from him: for it was sworn that being at the house of Fly at his death, he continued there until Midsummer; he did not say these goods

were his own upon application made to buy them, but that they were Turner's, the administrator and next-of-kin; sent to Turner, desiring him to take them away; and they were sent away, and Mosely assisted in packing them up, and declared he would not go into mourning, for, that Fly had given him nothing that he could help.

Lord Chancellor Hardwicke.—There are two general questions. What is the weight and strength of the evidence in point of fact? Next, the result of that evidence in point of law, or the law arising on this fact?

As to the first, and as to the conviction arising therefrom, there is, to be sure, very strong evidence on the part of the plaintiff of Fly's general intention of bounty, which is not to be disputed; but as to the evidence of the particular gifts, I cannot help taking notice that the declarations relied on by the plaintiff to prove them are all made to persons of extreme low degree, his porter, barber, etc. It is observable, also, that Fly was bred an attorney: had some property, some real estate, was a man of business; and must be presumed, from his profession and education, to know something of what the law required to make a will; and certainly it would be more easy for him to have made a will in writing than to have taken all these several steps to give away these parts of his estate. It is likewise observable that the behaviour of Mosely, and his declarations after the death of Fly, are some impeachment and weakening of the plaintiff's evidence; for it is extraordinary that, if he thought himself intitled, he should not insist upon these goods being his own, instead of suffering them to be taken away, and assisting therein. At the same time, if I was to ground my opinion upon any objection to the evidence in point of fact, I should not determine it, but send it to be tried; for this is as proper a case to be tried as any other.

It is not insisted upon by the plaintiff as a testamentary cause; for if he was to insist on that, it would overturn his demand, as he has no probate; but it is insisted on as a donation *mortis causa*. *Trover* might be brought for it; for it would transfer the property: but though I have searched for it, I do

not find a case of that kind in the books, of such an action at law: but it might be tried at law, was there a foundation for it; and if I was to ground my opinion upon the evidence in point of fact, I would direct a trial.

But, according to my opinion, there is no reason to give the parties that trouble: for next, supposing the fact well proved, the consideration is the result in point of law.

The relief sought is founded upon these gifts being good donations *mortis causa*.

First, as to any specific parts (if they may be so called), except the annuities. They are clearly not good (as I declared at the hearing), there being no pretence of any delivery in any shape whatever. They are so general as, in my opinion, if they prove anything, prove an intent to make a nuncupative will of all his personal estate (this is exclusive of annuities), saying, "Mosely, I give you all the plate and goods in this house,' or, "If I die, all are yours"; but nothing was delivered. It is said he had possession by living in the house, and did not want delivery, but he lived as a servant, who had no possession; so that if a servant had them in custody, it would be a possession for his master. The other declarations are not only of the goods, but of all money and arrears of rent, and to extend almost to everything; consequently, there is no ground to carry it so far; and it is impossible to support any of these as gifts in prospect of death, as I have declared already.

Next, as to the gift of this annuity. If the witnesses deserve credit, it is strong evidence of a general intent of bounty; but it rather turns against the plaintiff, for it shows a general intent to give the whole to Mosely, by making a nuncupative will or wills at different times. If that was to be admitted to support these several gifts as so many donations *mortis causa*, it would overturn not only the letter but the whole spirit and intent of the Statute of Frauds. But, notwithstanding, suppose this gift of the annuities was just, as if it was a distinct and independent donation from the other matters insisted on as gifts, the question is, whether it is such a gift as the law of England allows, as a donation *mortis causa*? First, the fact of the gift is proved only by one witness: whereas the civil law, from which this doctrine

is taken, requires five witnesses thereto; for Justinian when he allowed these gifts, was apprehensive of fraud arising from them, and takes notice in that very chapter relied on for the plaintiff that he had made a constitution to regulate it, that it should be in the presence of five, limited in point of value, etc., which shews how jealous he was of it. Besides, the witness swears to this in very formal words; and, though it is pretty hard to object to a witness as loose and uncertain on one hand, and the contrary on the other, yet this argues either a very strong memory or a pretty strong assurance in swearing. But the express gift, as he swears, is only of the three receipts. That is the form of the gift. Taking it therefore according to the substance of the gift, that this amounted to a declaration that Fly, by giving these receipts, intended to give the annuities, upon this the principal point arises, whether delivery of the thing given by way of donation *mortis causa* is necessary; and, if necessary, whether this delivery of the receipts is sufficient delivery of the thing given by way of donation *mortis causa*? I am of opinion that delivery is necessary to make good such a gift, and that the delivery of these receipts for the consideration-money of the purchase of them was no sufficient delivery to validate this act. To clear this, it is proper to consider the notion of a donation *mortis causa* according to the civil and Roman law and the law of England.

According to the civil and Roman law there is a great variety, and several passages therein are pretty difficult to reconcile (*b*). Digest, lib. 39, tit. 6, Law 38, requires that both donor and donee should be present at the time of the gift, "*quo præsens præsenti dat*"; which looks as if delivery was intended at the time. It is "*quo*" there, and in several editions: but in the Lyons edition of Gothofredus' Corpus it is "*quod*"; which makes it sense. Next, in Digest, same tit., parag. 1, it speaks of it throughout as a restoring of the same thing, if donor should recover: as if a restitution was to be. It is proper to take notice that in the Roman law there were *three* kinds of donations *mortis causa*. And in Voet on the Pandect, lib. 39, tit. 6, parag. 3, in

(*b*) See *Tate* v. *Hilbert*, 2 V. 111, 2 R. R. 175; and *Agnew* v. *Belfast, etc. Co.*, [1896] 2 Ir. R., at p. 209.

his 2nd vol., p. 710, the division is agreeable to that made of these donations by Swinburne. The first is a donation by one in no present danger, but in consideration of mortality if he died; and this is strictly compared to a legacy; for the property was to pass at the death, not at the time. The second kind is where the property passed at the time, defeasible in case of an escape from that danger in view, or of recovery from that illness. The third was where, though he was moved with the danger, yet not thinking it so immediate as to vest the property immediately in the person, but put it in possession of the person as an inchoate gift, to take effect, in case he should die. Vinius's Comment. on this place of Justinian is more particular—puts the remedy by action donor might have, in case he repented or revoked. That is, on the last kind of donation *mortis causa*, where he did not part with the property immediately, he should have a real action; but where he actually parted with the property, but the gift was to be defeated by his revocation or recovery, or escape from that danger he was in, *conditionem habeat* (which is a personal action) to make the irritancy, or to recover damages for the thing: so that it differed not but in the nature of the action. And in Calvin's Lexicon, etc., that is the distinction. Swinburne, on the text I have quoted, implies there should be a delivery; saying that legacies differ from such donations, for that legacies are not delivered by the testator, but to be paid or delivered by the administrator; putting the distinction upon the one being delivered in life, the other after death. But, notwithstanding this, several books in the civil law import the contrary; particularly Vinius, in his Comment., lib. 2, tit. 7, s. 1, numero 2; Covarruvias, vol. 1, rub. 3, and Voet on the Pandects, same chapter, num. 3 and num. 6, which passages show the different expression and opinions, some importing a delivery, others not. I have mentioned them to come at that which seems the distinction, reconciling them all, according to what is laid down by Voet, num. 6, that they did not require an absolute delivery of possession to the first or third kind of gift I have mentioned; but in the other case, where the property was to pass immediately, it was required; which is the meaning of the expression in Voet, "*in mortis causa donatione dominium non*

transit sine traditione" and of that other expression in Voet. With this distinction, these passages in the civil law are properly reconciled.

Though I know these donations *mortis causa* could never come directly in question in the Ecclesiastical Court, they might collaterally; and on these two heads I inquired whether there have been any cases there upon this, *viz.*, in suits against an administrator on account of assets by the next-of-kin, where the administrator had insisted he could not administer such a part, because it was given *mortis causa*; or, if there is a will, in which there are specific legacies, and one of those legacies he had given in his life by way of donation *mortis causa*, there it might come in question in the Ecclesiastical Court; but I cannot find it has. The nearest case to it is *Ousley* v. *Carrol* (*c*), June, 1722, in the Prerogative Court, before Dr. Bettesworth. There was left a writing in the presence of three witnesses, not in the form of a will but a deed, *viz.*: "I have given and granted, and give and grant, to my five sisters, and children of the sixth, their heirs, executors, and administrators, in case they survive me, all my goods and chattels, and real and personal estate, and all which I may claim in right of my own, whether alive or dead." The dispute was by a person claiming as his wife, and who had been so, but divorced, who insisted this was no will but deed of gift *mortis causa* (and a gift *mortis causa* may be made in writing as well as otherwise, and so it might by the Roman and civil law); but the Ecclesiastical Judge was of an opinion this was testamentary, proved it as such, as a testamentary act, and probate was granted, from which there was no appeal; but a case was there cited of *Shargold* v. *Shargold*, upon deed of gift by Dr. Pope, not to take place until his death, and sixpence delivered by way of symbol, to put grantee in possession; that was pronounced for as a will, not as a donation *mortis causa*; which I mention to show how far the Ecclesiastical Court has considered these things as testamentary.

Having considered these donations, the different species, and how far delivery is necessary by the Roman and civil law, I will

(*c*) See *Thorold* v. *T.*, 1 Phillim. 1; *Att.-Gen.* v. *Jones*, 3 Price, 368.

consider it according to the law of England. They are undoubtedly taken from the civil law; but not to be allowed of here farther than the civil law on that head has been received and allowed. Taking the law of England to consist (as Hob. says) of rules of law and equity, it might have come in question in cases of action of *trover* and *detinue*; but I have never found any action on that head. Consider it, therefore, as in this Court, the civil law not binding here, but as far as received and allowed; which must be from adjudged cases and authorities, proving that the civil law has been received in England, in respect of such donations, only so far as attended with delivery, or what the civil law calls *traditio*, for which see Swinburne, who, being an English writer on the civil law, what he lays down is some evidence of what has been received here, Part 1, s. 7; but, in other places, s. 6, in tit. Definition of Legacy, he is still more express. In both places, in one directly, in the other collaterally, he lays down that delivery is necessary.

Next, consider it on the resolutions of this Court; the same thing results from them. There are not many cases on this head, and they are somewhat loose. The first is *Drury* v. *Smith* (*d*), where Lord Cowper founded himself on this, and the possession transmitted and changed: next *Lawson* v. *L.* (*e*). All that I can collect from thence is that the [gift of the] purse was held good, because delivered to the wife herself. As to the other legacy of £100 bill, I cannot say on what it depended. It is a kind of compound gift; so many collateral circumstances are taken into it that nothing can be inferred from it; but, being a draft on his goldsmith, that draft was delivered; so that it does not contradict what I lay down; and there was delivery, so far as it was capable. In *Jones* v. *Selby* (*f*), the result is that the opinion of the Master of the Rolls was founded plainly on this, of the delivery of possession, holding that the gift of the tally, as contained in the hair trunk, was a good donation *mortis causa*; and that Lord Cowper avoided determining that, on the foundation of the subsequent point of a satisfaction or ademption, on which he grounded his determination. In all the instances,

(*d*) 1 P. W. 404.
(*e*) 1 P. W. 441.
(*f*) Pr. Ch. 300.

it is absolutely necessary to be the person's after the party's death; though, in some cases, it vests the property, in others not. But, to explain more fully Lord Cowper's opinion there, I will refer you back to *Drury* v. *Smith*, and to *Hedges* v. *H.* (*g*), which turned on another point; but there Lord Cowper laid down a necessity of delivery very strongly; where he says testator "gives with his own hands." *Baily* v. *Snelgrove* (*h*), determined by me, March 11, 1744, was urged, where a bond was given in prospect of death; the manner of gift was admitted; the bond was delivered; and I held it a good donation *mortis causa*. It was argued that there was no want of actual delivery there, or possession, the bond being but a chose in action; and, therefore, there was no delivery but of the paper. If I went too far in that case, it is not a reason I should go further, and I chuse to stop there. But I am of opinion that decree was right, and differs from this case; for, though it is true that a bond, which is specialty, is a chose in action, and its principal value consists in the thing *in action*, yet some property is conveyed by the delivery; for the property is vested, and to this degree, that the law books say the person to whom this specialty is given may cancel, burn, and destroy it; the consequence of which is that it puts it in his power to destroy the obligee's power of bringing an action, because no one can bring an action on a bond without a profert *in curiam*. Another thing made it amount to a delivery, that the law allows it a locality; and, therefore, a bond is *bona notabilia*, so as to require a prerogative administration, where a bond is in one diocese and goods in another. Not that this is conclusive; this reasoning I have gone upon is agreeable to Jenk. Cent. 109, case 9, relating to delivery to effectuate gifts. How Jenkins applied that rule of law he mentions there, I know not; but rather apprehend he applied it to a donation *mortis causa;* for if to a donation *inter vivos*, I doubt he went too far.

Another case is *Miller* v. *M.* (*k*), which is a very strong case, so far as that opinion goes, to require delivery; which case, I believe, was hinted at as inconsistent with my decree; but there is a great difference between delivery of a bond (which is a

(*g*) Pr. Ch. 269.
(*h*) 3 Atk. 214.
(*k*) 3 P. W. 356.

specialty, is itself the foundation of the action, and the destruction of which destroys the demand), and the delivery of a note payable to bearer, which is only evidence of the contract. Therefore, from the authority of Swinburne, and all these cases, the consequence is that by the civil law as received and allowed in England, and consequently by the law of England, *tradition or delivery is necessary to make a good donation mortis causa*; which brings it to the question whether delivery of the three receipts was a sufficient delivery of the thing given to effectuate the gift. I am of opinion it was not.

It is argued that though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of *symbol* is sufficient; but I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery to some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, they require actual tradition, delivery over of the thing. So in all the cases in this Court, delivery of the thing given is relied on, and not in name of the thing, as in the delivery of sixpence, in *Shargold* v. *S.*; if it was allowed any effect, that would have been a gift *mortis causa*, not as a will, but that was allowed as testamentary, proved as a will, and stood. The only case wherein such a symbol seems to be held good is *Jones* v. *Selby*; but I am of opinion that amounted to the same thing as delivery of possession of the tally, provided it was in the trunk at the time. Therefore, it was rightly compared to the cases upon 21 Jac. 1, *Ryall* v. *Rowles* (*l*), and others. It never was imagined, on that statute, that delivery of a mere symbol in name of the thing would be sufficient to take it out of that statute; yet notwithstanding, delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing; and, therefore, the key is not a symbol, which would not do. If so, then delivery of these receipts amounts to so much waste paper; for if one purchases stock or annuities, what avail are they after acceptance of the stock? It is true, they

(*l*) 1 Ves. Sen. 348, *ante*.

are of some avail as to the identity of the person coming to receive; but after that is over, they are nothing but waste paper, and are seldom taken care of afterwards. Suppose Fly, instead of delivering over these receipts to Mosely, had delivered over the broker's note, whom he had employed, that had not been a good delivery of the possession. There is no colour for it; it is no evidence of the thing, or part of the title to it; for suppose it had been in a mortgage in question, and a separate receipt had been taken for the mortgage money, not on the back of the deed (which was a very common way formerly, and is frequently seen in the evidence of ancient titles), and mortgagee had delivered over this separate receipt for the consideration-money, that would not have been a good delivery of the possession, nor given the mortgage, *mortis causa*, by force of that act. Nor does it appear to me, by proof, that possession of these three receipts continued with Mosely from the time they were given, in February, to the time of Fly's death; for there is a witness who speaks, that, in some short time before his death, Fly showed him these receipts, and said, he intended them for his uncle Mosely. Therefore, I am of opinion, it would be most dangerous to allow this donation *mortis causa*, from parol proof of delivery of such receipts, which are not regarded or taken care of after acceptance; and if these annuities are called choses in action, there is less reason to allow of it in this case than in any other chose in action, because stocks and annuities are capable of a transfer of the legal property by Act of Parliament, which might be done easily; and if the intestate had such an aversion to make a will as supposed, he might have transferred to Mosely; consequently, this is merely legatory, and amounts to a nuncupative will, and contrary to the Statute of Frauds, and would introduce a greater breach on that law than was ever yet made; for if you take away the necessity of delivery of the thing given, it remains merely nuncupative. To this purpose, consider the clauses in the Statute of Frauds (*m*) relating to this; which seems to me to be applied directly to prevent a mischief of this sort. The clauses

(*m*) 29 Car. 2, c. 3.

are in sections 19, 20, 21, 22 (*n*), which have very anxious provisions against dispositions of this kind, requiring three witnesses, solemn declaration of testator, fixing the place of making, and to be reduced into writing in six days after making. These are in cases where no will was made. Next, comes another requisite, where a will has been made. If what the plaintiff insists on is right in point of law, that this gift of the annuities by delivery of the receipts was good, yet, though Fly had made a will before, it had been equally good, notwithstanding that will, because this relates to revocation of a will in writing by anything amounting to a testamentary act. It would be good against the will, as appears from the cases. Would not that be quite contrary to the plain provision of this clause, taking away delivery of the thing? Here is, then, a revocation of a will by words only, *viz.*: "This is yours when I die." All these clauses, therefore, will be overturned, if such evidence is admitted. But it is said, if this is not allowed, it will be impossible to make a donation *mortis causa*, of stock or annuities, because in their nature they are not capable of actual delivery. I am of opinion, it cannot, without a transfer, or something amounting to that: and there is no harm in it, considering how much of the personal estate of this kingdom, vastly the greatest proportion of it, subsists now in stock and funds; and all the anxious provisions of the Statute of Frauds will signify nothing, if donation of stock, attended only by delivery of the paper, is allowed. It might be supported to the extent of any given value, and would leave these things under the greatest degree of uncertainty, and amount to a repeal of that useful law as to all this part of the property of the subjects of this kingdom. Therefore, notwithstanding the strong evidence of the intent, this gift of annuities is not sufficiently made within the rules of the authorities; and I am of opinion not to carry it further. If any doubt remains in any one's mind, I will add (what I very seldom do, though it has been done by my predecessors) that I should be very glad to have this point settled by the supreme

(*n*) These sections are repealed by 1 Vict. c. 26, s. 2.

authority; for it highly ought to be settled, if there is a doubt, considering so large a property of this kind.

The bill ought to be dismissed therefore, without costs, as to the demand of these annuities, or any other part of the intestate's estate by way of donation *mortis causa*.

But as there was a plain intent of bounty and kindness to this old man, who lived with him as a servant, and it seems in expectation of what should be given at his death, therefore, on the other part of the bill an inquiry should be, what Mosely deserved over and above his maintenance, for services performed during life of Fly. The account should be taken from a reasonable time, if the plaintiff thinks fit to pray it.

NOTES.

1. Generally.
2. Requisites to a *donatio mortis causa*, p. 355.
3. What may be the subject of a *donatio mortis causa*, p. 361.
4. Evidence, p. 365.

1. Generally.

In *Ward* v. *Turner*, which is a leading case on the doctrine of donations *mortis causa*, Lord Hardwicke, with great learning, discusses the authorities upon the civil law, from which it has been imported into the law of England. In the subsequent case of *Tate* v. *Hilbert* (*o*), *Ward* v. *Turner* was commented on, and the civil law more fully explained, by Lord Rosslyn, in his able judgment. "A *donatio mortis causa*," said Buckley, J., in *Re Beaumont* (*p*), "is a singular form of gift. It may be said to be of an amphibious nature, being a gift which is neither entirely *inter vivos* nor testamentary. It is an act *inter vivos* by which the donee is to have the absolute title to the subject of the gift not at once but if the donor dies. If the donor dies the title becomes absolute not under but as against his executor. In order to make the gift valid it must be made so as to take complete effect on the donor's death. The Court must find that the donor intended it to

(*o*) 2 V. 111; *Staniland* v. *Willott*, 3 Mac. & G. 674.

(*p*) [1902] 1 Ch., at pp. 892, 893; and see *Re Korvine's Trust*, [1921] 1 Ch. 343; *Re Swinburne*, [1926] 1 Ch. 38.

be absolute if he died, but he need not actually say so." It may be made by parol, or by writing or deed (*q*), and the Wills Act (*r*) has not either in words or in effect abolished these donations (*s*). If the donor recovers from the particular illness during or in contemplation of which the gift was made, the gift does not operate (*t*). *Sin autem supervixisset is, qui donavit, reciperet* (*u*).

Distinction between a donatio mortis causa and a donation inter vivos and legacies.—A *donatio mortis causa* resembles a legacy, inasmuch as it is ambulatory and incomplete during the life of the donor, and may be revoked by him at any time before death, and is liable to his debts on a deficiency of assets (*x*); and is subject to legacy duty (*y*) and in the above respects it differs from a gift *inter vivos*, and it also differs from a gift *inter vivos* in the following important particular, namely, that an incomplete voluntary gift *inter vivos* will not be perfected by the assistance of equity (*z*); whereas in the case of a *donatio mortis causa*, equity will insist upon executors or administrators, as trustees for the donee, doing what may be necessary to complete the gift (*a*).

A *donatio mortis causa* differs from a legacy, inasmuch as probate of it is unnecessary (*b*), and it is taken against, and not from, the executor (*c*), whose assent to its enjoyment is not necessary, and before the Judicature Acts its validity might be tried by an action at law (*d*).

Where the property in a thing made the subject of a *donatio mortis causa* does not pass by delivery, as, for instance, in the case of a bond, the donee may, upon indemnifying the personal representatives of the donor, sue in their names for the debt secured by such bond (*e*).

(*q*) See the principal case, and *Johnson* v. *Smith*, 1 Ves. Sen. 314; *Tate* v. *Hilbert*, 2 V. 120.

(*r*) 1 Vict. c. 26.

(*s*) *Moore* v. *Darton*, 4 De G. & Sm. 517.

(t) See *Staniland* v. *Willott*, 3 Mac. & G. 664, 674.

(*u*) Institutes of Just., Book 2, title 7, s. 1.

(*x*) *Smith* v. *Casen*, 1 P. W. 406.

(*y*) 8 & 9 Vict. c. 76, s. 4; 44 Vict. c. 12, s. 38, sub-s. 2; 52 Vict. c. 7, s. 11.

(*z*) *Ellisson* v. *E.*, Vol. II, *post*.

(*a*) See *Re Swinburne*, [1926] 1 Ch., at p. 46, where the passage in the text is cited with approval by Sargant, L.J.; and see judgments of Cotton and Lindley, L.JJ., *Re Dillon*, 44 Ch. D., at pp. 82, 83; *Re Beaumont*, [1902] 1 Ch., at p. 894.

(*b*) See *Rigden* v. *Vallier*, 2 Ves. Sen. 258.

(*c*) *Re Beaumont*, [1902] 1 Ch., at p. 892.

(*d*) See *Thompson* v. *Hodgson*, 2 Stra. 777.

(*e*) *Gardner* v. *Parker*, 3 Madd. 184.

Ward v. Turner.

If the donor recover of his illness, *or* if he resume the possession of the gift, it will be defeated (*f*).

But the donor cannot revoke it by will, for upon his death the gift becomes complete (*g*); it was, however, decided in that case, that a *donatio mortis causa* may be satisfied by a legacy.

It is clear that the donee may be put to his election, if the subject of the donation is bequeathed to another person, and some benefit is conferred by the will upon the donee (*h*).

Testamentary gifts.—It is well settled that if an instrument is clearly testamentary, that is, an instrument not intended to take effect until after the death of the person executing it, and dependent upon his death for its vigour and effect (*i*), and such instrument is not duly executed as a will, it will not be supported as a *donatio mortis causa* (*k*).

2. Requisites to a Donatio mortis causa.

The following circumstances are requisite in order to constitute a good *donatio mortis causa* :—

1. The gift must be made by the donor in contemplation of the conceived approach of death (*l*); but a gift will be presumed to be so made, where the donor is " in his last sickness," or " languishing on his death-bed " (*m*), but not where suicide is contemplated (*n*).

2. The gift must be intended to take complete effect only after the donor's decease (*o*). But it is not absolutely necessary that the donor should expressly declare that the gift is to be returned to him if he recover, for if it be made in the extremity of sickness, or in contemplation of death, the law implies a condition, that it is to be held only by the donee in the event of the donor's death. Thus, in

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(*f*) *Bunn* v. *Markham*, 7 Taunt. 231; *Staniland* v. *Willott*, 3 Mac. & G. 664.

(*g*) See *Jones* v. *Selby*, Pr. Ch. 300; but cf. *Hambrooke* v. *Simmons*, 4 Russ. 25; *Hudson* v. *Spencer*, [1910] 2 Ch. 285.

(*h*) See *Johnson* v. *Smith*, 1 Ves. Sen. 314.

(*i*) See *Cock* v. *Cooke*, L. R. 1 P. & D., at p. 243.

(*k*) *Re Hughes*, 36 W. R. 821; *Solicitor to Treasury* v. *Lewis*, [1900] 2 Ch. 812.

(*l*) *Duffield* v. *Elwes*, 1 Bli. (N.S.) 497, 530; *Edwards* v. *Jones*, 1 My. & C. 233, 236; *Hedges* v. *H.*, Pr. Ch. 269; *Walter* v. *Hodge*, 2 Swans. 92, 100; *Re Kirkley*, 25 T. L. R. 522.

(*m*) *Miller* v. *M.*, 3 P. W. 356; *Lawson* v. *L.*, 1 P. W. 441; *Walter* v. *Hodge*, 2 Swans. 100; but see the dictum of Eyre, C.B., in *Blount* v. *Burrow*, 1 V. 546, not found in 4 Bro. Ch. 72.

(*n*) *Agnew* v. *Belfast, etc. Co.*, [1896] 2 Ir. R. 204; *Re Dudman*, [1925] Ch. 553.

(*o*) *Edwards* v. *Jones*, 1 My. & C. 233; *Tate* v. *Hilbert*, 2 V. 120.

Ward v. Turner.

Gardner v. *Parker* (*p*), A being seriously ill, two days before his death, in the presence of a servant, gave B a bond, saying at the same time, "There, take that, and keep it." Leach, V.-C., held the gift to be a *donatio mortis causa*. "The doubt," said his Honour, "here is, that the donor has not expressed that the bond was to be returned if he recovered. This bond was given in the extremity of sickness, and in contemplation of death; and it is to be inferred, that it was the intention of the donor that it should be held as a gift only in case of his death. If a gift is made in expectation of death, there is an implied condition, that it is to be held only in the event of death" (*q*).

If, however, it appear from the circumstances of the transaction, that the donor intended to make an immediate or irrevocable gift, it will not be a good *donatio mortis causa*. Thus, in *Edwards* v. *Jones* (*r*) M. C., the obligee of a bond, five days before her death, signed an indorsement, not under seal, upon the bond as follows: "I M. C., do hereby assign and transfer the within bond or obligation, and all my right, title, and interest thereto, unto and to the use of my niece E. E., with full power and authority for the said E. E. to sue for and recover the amount thereof, and all interest now due, or hereafter to become due, thereon," and at the same time the donor handed to her niece the bond. It was argued, that if the gift could not, in consequence of its being incomplete (*s*), take effect as a *donatio inter vivos*, it would take effect as a *donatio mortis causa*. But Lord Cottenham held that it could not take effect as a *donatio mortis causa*, as an absolute and irrevocable gift was intended (*t*).

Although there be an actual legal transfer of property such as standing by itself alone, would amount to a complete gift *inter vivos* it will nevertheless be a *donatio mortis causa* if there be annexed to the gift a condition either express or implied, that it is only to take effect in the event of the death of the giver, and upon his recovery the donee will be a mere trustee (*u*) unless there be a

(*p*) 3 Madd. 184.

(*q*) See *Tate* v. *Leithead*, Kay, 658, 662; *Lawson* v. *L.*, 1 P. W. 441; *Miller* v. *M.*, 3 P. W. 358; *Jones* v. *Selby*, Pr. Ch. 300; *Re Beaumont*, [1902] 1 Ch. 889.

(*r*) 1 My. & C. 226.

(*s*) See as to this, *Re Dillon*, 44 Ch. D., at p. 82; *Re Weston*, [1902] 1 Ch. 680; *Re Beaumont*, [1902] 1 Ch. 889; *Re Andrews*, [1902] 2 Ch. 394; *Re Lee*, [1918] 2 Ch. 320.

(*t*) See also *Moore* v. *M.*, 18 Eq. 474, 484.

(*u*) *Staniland* v. *Willott*, 3 Mac. & G. 664.

confirmation of the gift, so as to convert it into, or give it the effect of, an absolute irrevocable gift *inter vivos* (*x*).

3. There must also be a delivery of either property or the *indicia* of title to property (*y*), to the donee for his own use (*z*); or upon trust for another person (*a*). An antecedent delivery of the chattel *alio intuitu* to the donee may be sufficient (*b*); and a delivery insufficient for a gift *inter vivos* may be sufficient for a *donatio mortis causa* (*c*).

In *Bunn* v. *Markham* (*d*) a person supposing himself *in extremis*, caused India bonds, bank notes, and guineas, to be brought out of his iron chest, and laid on his bed; he then caused them to be sealed up in three parcels, and the amount of the contents to be written on them, with the words, " For Mrs. and Miss C.," the plaintiffs; he then directed the brother to replace them in the iron chest, to be locked up, the keys to be sealed up, and directed " to be delivered to J." (his solicitor), and one of his executors, after his decease, and replaced in his own custody near his bed; and afterwards spoke of this property as given to the plaintiffs. It was held not to be a *donatio mortis causa*, for want of a sufficient delivery, and on account of the donor continuing in possession (*e*).

Trust or Condition.—In *Hills* v. *H.* (*f*), where a person on her death-bed gave a pocket-book, containing £80 in cash and notes, to her brother, wishing that he should bury her, and that he should have all she had, it was held, in the Exchequer, by Abinger, C.B., Parke, Alderson and Rolfe, BB., that it was a good *donatio mortis causa*, although coupled with a trust. " I cannot see," said Rolfe, B., " how the annexation of a trust to the gift can make any difference. If it be lawful so to give the property out and out to the party for his own use, I cannot see that it makes any difference, that with it he is to pay for a particular thing. If a

(*x*) *Staniland* v. *Willott*, 3 Mac. & G. 681.

(*y*) *Re Beaumont, supra*; *Re Weston, supra*; *Re Andrews, supra.*

(*z*) *Tate* v. *Hilbert*, 2 V. 120.

(*a*) *Drury* v. *Smith*, 1 P. W. 405; *Farquharson* v. *Cave*, 2 Coll. Ch. R. 367; *Moore* v. *Darton*, 4 De G. & Sm. 517; and see *Bibby* v. *Coulter*, Ridg. Cas. t. H. 206 (n.); *Dunne* v. *Boyd*, 8 Ir. R. Eq. 609; *Re Korvine*, [1920] 1 Ch. 343.

(*b*) *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*c*) See the judgment in *Re Wasserberg*, [1915] 1 Ch. 195.

(*d*) 7 Taunt. 224, 231.

(*e*) See also *Farquharson* v. *Cave*, 2 Coll. Ch. R. 356; *Walsh* v. *Studdart*, 4 Dr. & War. 159; *Thompson* v. *Heffernan*, 4 Dr. & War. 285; *Powell* v. *Hellicar*, 27 B. 261; *Maguire* v. *Dodd*, 9 Ir. Ch. R. 452; *Re Johnson*, 92 L. T. 357; but consider *Re Dillon*, 44 Ch. D. 76; *Re Wasserberg*, *supra.*

(*f*) 8 M. & W. 401.

man on his death-bed gives another £1,000, is it any addition to the evils attending this mode of bestowing property, that he attaches a condition to it; as, for instance, that he stipulates, that his brother shall receive an outfit to India? The case of *Blount* v. *Burrow* is expressly in point, and disposes of the question; and I have no doubt that other cases might be found." These decisions rightly follow the civil law, according to which it is clear that a *donatio mortis causa* might be made the subject of a trust or condition (*g*).

Dominion must be parted with.—Even if there be a delivery to the donee or to some one for him, it will not be good, unless the donor (subject of course to the ordinary condition making void the gift, which is always either expressed or implied in case of his recovery) *parts with the dominion* over the thing given. Thus, in *Hawkins* v. *Blewitt* (*h*), in an action of trover for a box containing money and wearing apparel, by an administrator, the case on the part of the plaintiff was, that the intestate in his last illness ordered the box to be carried to the house of the defendant, who was his aunt, and to be delivered to her; but he gave no other directions respecting it, nor said anything about giving it to her. It was, however, further given in evidence, that on the next day, the key was brought to the intestate, who desired it to be taken back, saying that he should want some articles of clothing out of it. The plaintiff had a verdict. Lord Kenyon, C.J., said, "In the case of a *donatio mortis causa*, possession must be immediately given; that has been done here: a delivery has taken place, but it *is also necessary that by parting with the possession, the deceased should also part with the dominion over it.* That has not been done here. The bringing back the key by her the next morning to the intestate, and his declaration that he should want one of the articles of his apparel contained in it, are sufficient to show that he had no intention of making any gift or disposition of the box. It seems rather to have been left in the defendant's care for safe custody, and was so considered by herself" (*i*).

In *Re Johnson* (*k*), a testatrix shortly prior to her decease had

(*g*) Dig. lib. 31, tit. 1, I. 77, s. 1, cited 4 Russ. 27, 2 Coll. Ch. R. 356; Cod. lib. 6, tit. 42, l. 9, cited 4 Russ. 27, but see *Bibby* v. *Coulter*, Ridg. Cas. t. H. 206 (n.). Cf. *Re Korvine*, [1920] 1 Ch. 343. (*h*) 2 Esp. 663.

(*i*) See also *Reddel* v. *Dobree*, 10 Si. 244; *Tapley* v. *Kent*, 1 Robert. 400; *Warriner* v. *Rogers*, 16 Eq. 340; *Solicitor to Treasury* v. *Lewis*, [1900] 2 Ch. 812; *McAndrew* v. *Mulroy*, [1924] 1 Ir. R. 98; *Re Hawkins*, [1924] 2 Ch. 47.

(*k*) 92 L. T. 357.

intrusted a box to the care of a friend, and had requested this friend to carry out her instructions. At a subsequent interview the testatrix showed the friend a key with a label attached thereto, saying : " If I die this will be sent to you." On the day of the testatrix's death the key with the label was received by the friend, and the box was found to contain share certificates and valuables, with a paper giving directions as to the persons to whom the testatrix desired the contents of the box to be given, and it was held by Farwell, J., that, inasmuch as the testatrix had retained the key, she had not parted with her dominion over the property contained in the box, and consequently that the handing over of the box did not constitute a valid *donatio mortis causa*.

In *Taylor* v. *T.* (*l*), T. in his last illness showed a deposit note to his daughter, the plaintiff, and told her in effect it was to belong to her in the event of his death. The plaintiff took the note, and by her father's directions put it in a cash-box for safe custody. The cash-box was kept in the father's bedroom, but she had the key. Held, a good *donatio mortis causa*.

Where the legal title does not pass by delivery.—A delivery of a thing by way of symbol, according to the opinion of Lord Hardwicke in the principal case, is not a sufficient delivery. Thus, he held that the delivery of the receipts for South Sea Stock was not a sufficient delivery to constitute a *donatio mortis causa*, but he said that an actual transfer, or something amounting to that, would have been necessary (*m*). The same conclusion has been arrived at with regard to scrip certificates of railway stock (*n*) and certificates of shares in a building society (*o*). And it has been held that the delivery of the book of a depositor in a private savings-bank is not a sufficient delivery to constitute a donation of the money deposited (*p*). But the delivery of a Post Office Savings Bank Book may constitute a good *donatio mortis causa* of the balance standing to the credit of the depositor (*q*).

In *Re Dillon* (*r*) Cotton and Lindley, L.JJ., pointed out that there may be a good *donatio mortis causa* where the instrument

(*l*) 56 L. J. Ch. 597; cf. *Re Hawkins*, *supra*.

(*m*) *Supra*, at p. 352; but see *Re Dillon*, 44 Ch. D. 76, 82, and 83; and *Moore* v. *Darton*, 4 De G. & Sm. 517.

(*n*) *Moore* v. *M.*, 18 Eq. 474.

(*o*) *Re Weston*, [1902] 1 Ch. 680.

(*p*) *M'Gonnell* v. *Murray*, 3 Ir. R. Eq. 460.

(*q*) *Re Weston*, [1902] 1 Ch. 680; *Re Andrews*, [1902] 2 Ch. 394; cf. *Re Lee*, [1918] 2 Ch. 320.

(*r*) 44 Ch. D. 76, 82, 83.

does not pass the legal property by delivery, for an equitable right is thereby created and the executors or administrators will be held trustees for the donee for the purpose of giving effect to the gift (*s*). In the case of a *donatio mortis causa* the Court will interfere to make the gift complete, although it will not do so in the case of a *donatio inter vivos* (*t*).

In *Re Mead* (*u*) a testator who held a banker's deposit note for £3,700, in his last illness, two days before his death, expressed a wish to give £500, part of the amount, to his wife. At his request a friend filled up a seven days' notice to the bank to withdraw the deposit, and the testator signed it; the friend then took the notice to the bank. The testator afterwards signed a form of cheque, which was on the back of the note, "Pay self or bearer £500"; the note was then handed to the wife. The testator died before the expiration of the seven days' notice. The practice of the bank was, when a customer withdrew part of a sum, which he had placed on deposit, to give him a fresh note for the balance. It was held that there had not been a valid *donatio mortis causa* of the £500, inasmuch as the donor did not intend to give the deposit note, but only to give by means of a cheque part of the money deposited (*x*).

In *Lawson* v. *L.* (*y*), A., during his last illness, drew a bill upon a goldsmith for the payment of £100 to his wife, with a written indorsement that the money was "to buy her mourning," and A. delivered the note to his wife; it was held that she was entitled to the money. And Lord Rosslyn, in *Tate* v. *Hilbert* (*z*), considered the case perfectly well decided. "For," he observed, "taking the whole bill together, it is an appointment of the money in the banker's hands to the extent of £100, for the particular purpose expressed in a written appointment; which is a purpose that necessarily supposes his death."

In *Jones* v. *Selby* (*a*) it was held by Trevor, M.R., that the delivery of the key of a trunk, with words of gift of the trunk and its contents, was a good delivery of a tally upon Government for £500 contained in the trunk. Lord Hardwicke observes, that the

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(*s*) And cf. *Duffield* v. *Elwes*, 1 Bli. (N.S.) 497; *Re Lee*, *supra*.

(*t*) See *Ellison* v. *E.*, Vol. II, *post*.

(*u*) 15 Ch. D. 651.

(*x*) *Per* Cotton, L.J., *Re Dillon*, 44 Ch. D., at p. 82; *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*y*) 1 P. W. 441; see *supra*, p. 348; cf. *Hopkinson* v. *Forster*, 19 Eq. 74.

(*z*) 2 V. 111, 2 R. R., at p. 183.

(*a*) Pr. Ch. 300.

transaction "amounted to the same thing as a delivery of possession of the tally, provided that it was in the trunk at the time."

Where a deposit is invested by the Post Office Savings Bank for the depositor in Government stock under the regulations contained in the deposit book by having the stock placed on the Savings Bank Investment Account of the National Debt Commissioners and credited to the depositor, the delivery of the investment certificate and the deposit book does not constitute a good *donatio mortis causa* of the Government stock (*b*).

3. What may be the Subject of a Donatio mortis causa.

In *Re Wasserberg* (*c*), the testator, who was about to undergo an operation, being possessed of bearer bonds in the custody of his bank, visited the bank in company with his wife and put the bonds in a sealed parcel, which, after writing his wife's name on it, he locked in a box. He stated to the bank manager (the wife being present) that he had put his wife's name on the parcel, so that when the box was opened by his executors they would hand the contents to her, and he gave to his wife a list of the bonds. On reaching home he gave the key to his wife, telling her to lock it up with the list of the bonds; which she did in a drawer of which she always kept the key. On the same day the testator went to a nursing home where he died. Held, by Sargant, J., a good *donatio mortis causa*. In *Re Korvine* (*d*) the testator, before entering a nursing home, placed in a bank in the joint names of himself and B., £1,000, and instructed B. (in the presence of L.) in case of the testator's death, to pay his funeral expenses and debts and to hand the balance to L., and also to pass to L. certain Russian bonds, money and jewellery, which were in a box in the custody of W. Held a good *donatio mortis causa* of the balance of the £1,000, and also of the Russian bonds, money and jewellery. In *Re Richards* (*e*), the testator, who was about to undergo a dangerous operation, was visited by a Miss R., an old friend. The testator had with him ten Victory bonds, which were registered in his name, and he requested Miss R. to take charge of the bonds "till such time as I am able to go to London. But if anything

(*b*) *Re Andrews*, [1902] 2 Ch. 394.
(*c*) [1915] 1 Ch. 195.
(*d*) [1921] 1 Ch. 343.
(*e*) [1921] 1 Ch. 513.

happens to me you are to keep them for yourself, as anything might happen these days." Miss R., by the testator's instructions, took the bonds out of a dressing-case, and, as she left, the testator added: "You will never see me walk again . . . the operation must take place." Held a good *donatio mortis causa*.

Where there has been a delivery by way of *donatio mortis causa*, the fact that the donee hands back the subject-matter of the gift for safe custody does not prevent the transaction being effectual. In *Re Hawkins* (*f*), the testator, a few days before his death, handed to his niece bank-notes enclosed in an envelope which he indorsed with her name and the words "not to be opened until after my death." The niece then suggested to the testator that as a precaution against fire she should put the envelope in his deed box, and this was done. The key of the box was hung on a nail in the wall facing the testator's bed. Held an effectual *donatio mortis causa*.

Negotiable instruments which are commonly treated as money for other purposes pass as donations (*g*). There may be a *donatio mortis causa* of a bond (*h*), though not of a mere simple contract debt, nor by the delivery of a mere symbol (*i*). So, likewise, of bank-notes (*k*); of a deposit-note given by a bank to the donor (*l*), and although the receipt is expressed to be not transferable (*m*), or although the depositor is required by the bank to sign a cheque indorsed on the note (*n*), and whether it be indorsed or not (*o*); and it seems, also, of all other notes, or bills payable to the bearer (*p*), or to order, though not indorsed by the donor (*q*), but

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(*f*) [1924] 2 Ch. 47.

(*g*) *Ranklin* v. *Weguelin*, 27 B. 309; *Veal* v. *V.*, *ibid.* 303.

(*h*) *Snellgrove* v. *Baily*, 3 Atk. 214; Ridg. Cas. t. H. 202; *Re Wasserberg*, *supra*; *Re Korvine*, *supra*; cf. *Re Richards*, *supra*.

(*i*) *Per* Leach, V.-C., in *Gardner* v. *Parker*, 3 Madd. 185; *Blount* v. *Burrow*, 4 Bro. Ch. 71; *Hirst* v. *Beach*, 4 Madd. 351, 356; *Clavering* v. *Yorke*, 2 Coll. Ch. R. 363 (n.).

(*k*) *Miller* v. *M.*, 3 P. W. 356; *Shanley* v. *Harvey*, 2 Ed. Rep. 125; *Ashton* v. *Dawson*, Sel. Ca. 14; *Re Hawkins*, *supra*.

(*l*) *Amis* v. *Witt*, 33 B. 619; *Moore* v. *M.*, 18 Eq. 474; *Dunne* v. *Boyd*, 8 Ir. R. Eq. 609; *Taylor* v. *T.*, 56 L. J. Ch. 597; *Re Farman*, 58 L. T. 12; *Cain* v. *Moon*, [1896] 2 Q. B. 283.

(*m*) *Cassidy* v. *Belfast B. Co.*, 22 L. R. Ir. 68; *Re Dillon*, 44 Ch. D. 76.

(*n*) *Re Dillon*, 44 Ch. D. 76; *Re Mead*, 15 Ch. D. 651.

(*o*) *Porter* v. *Walsh*, [1895] 1 Ir. R. 286.

(*p*) *Miller* v. *M.*, 3 P. W. 356; *Hill* v. *Chapman*, 2 Bro. Ch. 612; and see *Jones* v. *Selby*, Pr. Ch. 300; *Bibby* v. *Coulter*, Ridg. Cas. t. H. 206 (n.).

(*q*) *Ranklin* v. *Weguelin*, 27 B. 309; *Veal* v. *V.*, *ibid.* 303; *Porter* v. *Walsh*, *supra*.

not of an I.O.U. (*r*). A donor's own promissory note cannot be the subject of a *donatio mortis causa* (*s*).

In *Re Beaumont* (*t*), B., who was very ill and in expectation of death, drew a cheque for £300 in favour of E., to whom it was at once handed. E. indorsed the cheque and presented it for payment at B.'s bank, where B.'s account was overdrawn. The bank manager refused payment, stating that the signature of the drawer was not like the ordinary signature of B., and that he required some confirmation of the signature. Two days later B. died without the cheque having been cashed. Buckley, J., in holding that there had been no valid *donatio mortis causa*, said: "In order that the gift may be valid it must, I think, be shown that the donor handed over either property or the *indicia* of title to property which belonged to him. His own cheque is not property; it is only a revocable order such that if the banker acts on it the donee will have the money for which it relates. Even without actual payment of the cheque there may be a good gift—for instance, if there is an undertaking by the banker to the donee to hold the amount of the cheque for the latter that may be enough. Unless there is that, or something equivalent to it, there is no delivery of property, but only a delivery of that which, if acted upon, will procure the delivery of property. . . . The mere drawing of the cheque and handing it to the donee, coupled with the subsequent facts, did not amount to such a *traditio* as was required in order to give the donee a right to the amount of the cheque on the death of the donor. Even if the account had been in credit the drawee would not, I think, have obtained any right to the property. If a cheque were given by a donor who was dangerously ill, and the drawee went to a branch of the bank in the country and asked for payment, and the manager said 'The cash is locked up for the night; come to-morrow and I will pay you,' and the drawer died in the night, it might very well be that there was a good appropriation by the undertaking to answer the cheque, and a good *donatio morti causa*. . . . There was no promise to pay in the case before me; and if there is a promise not to pay but only to lend, that is not sufficient" (*u*). But the delivery of a cheque made

(*r*) *Duckworth* v. *Lee*, [1899] 1 Ir. R. 405.
(*s*) *Holliday* v. *Atkinson*, 5 B. & C. 501, 503; *Re Leaper*, [1916] 1 Ch. 579.
(*t*) [1902] 1 Ch. 889.
(*u*) See *Re Swinburne*, [1926] 1 Ch. 38.

payable to the donor's order may be a valid *donatio mortis causa*, although the cheque be not indorsed (*x*).

The delivery of a bond is still sufficient as a *donatio mortis causa* of the debt for which it is a security (*y*).

So likewise a policy of insurance on the life of the donor will pass by delivery as a *donatio mortis causa* (*z*).

A delivery of the mortgage deeds of real estate will constitute a valid *donatio mortis causa*. Lord Eldon, in *Duffield* v. *Elwes* (*a*), said : " If the delivery of a bond would, as it is admitted, give the debt in that bond, so as to secure to the donee of that bond the debt so given by the delivery of the bond, the question is, whether, the person having got, by the delivery of that bond, a right to call upon the executor to make his title by suing or giving him authority to sue upon the bond, what are we to do with the other securities if they are not given up? But there is another question : What are we to do with respect to the other securities, if they are delivered? In the one case, the bond and mortgage are delivered; in the other the judgment, which is to be considered on the same ground as a speciality, is delivered; with that, *the evidences of the debts* are all delivered. The instrument containing the covenant to pay is delivered. They are all delivered in such a way that the donor could never have got the deeds back again. Then the question is, whether regard being had to what is the nature of a mortgage, contradistinguishing it from an estate in land, those circumstances do not as effectually give the property in the debt as if the debt was secured by a bond only? * * * The opinion which I have formed is, that this is a good *donatio mortis causa*, raising by operation of law a trust; a trust which, being raised by operation of law, is not within the Statute of Frauds, but a trust which a Court of equity will execute " (*b*).

The delivery by a creditor to the debtor or his agent of that which is essential to the recovery of the debt is, it seems, sufficient. Thus, in *Moore* v. *Darton* (*c*), where, upon a loan, the borrower

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(*x*) *Clement* v. *Cheesman*, 27 Ch. D. 631. Cf. *McAndrew* v. *Mulroy*, [1924] 1 Ir. R. 98.

(*y*) *Duffield* v. *Elwes*, 1 Bli. (N.S.) 497.

(*z*) *Witt* v. *Amis*, 1 B. & S. 109; *Amis* v. *Witt*, 33 B. 619.

(*a*) 1 Bli. (N.S.) 497; *Porter* v. *Walsh*, [1895] 1 Ir. R. 284; [1896] 1 Ir. R. 148 (C. A.).

(*b*) See also *Meredith* v. *Watson*, 17 Jur. 1063; *Re Patterson*, 12 W. R. 941; *Re Dillon*, 44 Ch. D. 76; *Re Lee*, [1918] 2 Ch. 320; *Re Richards* [1921] 1 Ch. 513.

(*c*) 4 De G. & Sm. 517, cited by Cotton, L.J., in *Re Dillon*, *supra*.

had given the lender a receipt in the following form : " Received of Miss Darton £500, to bear interest at £4 per cent. per annum," it was held by Knight-Bruce, V.-C., that a delivery of the receipt to an agent of the borrower by the creditor on her death-bed, stating that she wished the debt to be cancelled, was a good *donatio mortis causa*.

4. Evidence.

The evidence to establish a *donatio mortis causa* should be clear and satisfactory, especially in those cases where the relation between the donor and donee is such as to give rise to suspicion that undue influence may have been used, as in the case of an alleged donation from a client to his solicitor (*d*), or from a person *in extremis* to a priest attending him to administer the last offices of religion (*e*).

There is no absolute rule of the Court that a gift of this kind may not be established by the evidence of the claimant alone (*f*). " The law is, that when an attempt is made to charge a dead person's estate, the evidence ought to be looked at with great care and thoroughly sifted, and the mind of the Judge who hears it ought to be first of all in a state of suspicion; but if, in the end, the truthfulness of the witnesses is made perfectly clear, and the tribunal believes them, the suggested doctrine (*i.e.*, that corroboration is necessary) becomes absurd " (*g*).

(*d*) *Walsh* v. *Studdart*, 4 Dr. & War. 159.

(*e*) *Thompson* v. *Heffernan*, *ibid.* 285.

(*f*) *M'Gonnell* v. *Murray*, 3 Ir. R. Eq. 465; *Hayslep* v. *Gymer*, 1 A. & E. 162; *Re Hodgson*, 31 Ch. D. 177.

(*g*) *Per* Esher, M.R., in *Re Garnett*, 31 Ch. D., at p. 9; *Re Hodgson*, *supra*; *Rawlinson* v. *Scholes*, 79 L. T. 350; *Re Griffin*, [1899] 1 Ch., at p. 413.

ELECTION.

NOYS *v.* MORDAUNT.

1706. 2 Vern. 581 (*a*).

Election.

A, having two daughters, B and C, devises fee-simple lands to B, and lands which were settled upon him in tail to C. If B will claim a share of the entailed lands under the settlement, she must quit the fee-simple lands; for the testator having disposed of the whole of his estate amongst his children, what he gave them was upon the implied condition they should release to each other.

John Everard, having two daughters, in 1686 makes his will, and devises to Margaret, his eldest daughter, his lands in Beeston, and £800 in money; to Mary, his second daughter, his lands in Stanborn and Broom, and £1,300 in money, provided and on condition she released, conveyed, and assured Beeston lands to her sister Margaret; and devised to his said second daughter £1,300 in money (*b*). Provided, if he should have a son, what was devised to his daughters to be void; and in such case gave to Margaret £1,200, and to Mary £1,000. Provided, if he should have another daughter, then he gave the £800 devised to Margaret to such after-born daughter; and the lands at Stanborn and Broom, and the £1,300 devised to Mary, the second daughter, to the said Mary and such after-born daughter, equally between them.

He shortly afterwards died, and left his wife enceinte of a daughter, Elizabeth. Mary married Higgs, and died without issue, not having given any release to Margaret, her sister, according to the will.

(*a*) *S. C.*, Eq. Ca. Abr. 273, pl. 3; Prec. Ch. 265; Gilb. Eq. Rep. 2.

(*b*) This last bequest of £1,300 in money seems to be a repetition of the first bequest of that sum with the lands in Stanborn and Broom.

Noys v. Mordaunt.

Elizabeth claimed not only the lands devised to her by the will, and a moiety of what was devised to her sister Mary, but also a moiety of the Beeston lands, devised to Margaret: the same, on the testator's marriage, being settled on himself for life, and his wife for her jointure, and to the first and other sons, and, in default of issue male, to the heirs of his body.

Question was, whether she should be at liberty so to do, or ought not to acquiesce in the will, or renounce any benefit thereby.

Lord Keeper Cowper.—In all cases of this kind, where a man is disposing of his estate amongst his children, and gives to one fee-simple lands, and to another lands entailed or under settlement (*c*), it is upon an *implied condition* that each party acquit and release the other; especially as in this case, where, plainly, he had the distribution of his whole estate under his consideration, and has given much more to Elizabeth than what belonged to her by the settlement, and had it in his power to cut off the entail.

(*c*) That is to say, entailed or settled upon the one to whom the fee-simple lands are given, or upon such one jointly with the other.

STREATFIELD *v.* STREATFIELD.

1735. Cas. t. Talbot, 176.

Election.

The ancestor, by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage in the usual manner. After marriage he makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son, settles other lands, in consideration of this last marriage, in the usual manner, and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders: and with direction, out of the profits to educate the grandson, and to place out the rest of the profits to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to his said daughters, their executors, etc. The grandson is not to be bound by the deed, which did not pursue the articles, but then he shall make his election when he comes of age, and if he chooses to take lands which ought to have been settled, the daughters (his aunts) shall be reprised out of the lands devised to him.

Thomas Streatfield, the plaintiff's grandfather, by articles previous to his marriage, May 31, 1677, agreed to settle lands in Sevenoake [in the county of Kent] to the use of himself and Martha, his intended wife, for their lives and the life of the survivor; and after the survivor's decease, to the use of the heirs of the body of him the said Thomas on his wife begotten, with other remainders over.

The marriage soon after took effect, and by deed, dated April 5, 1698, reciting the foresaid articles, he settled his lands at Sevenoake to the use of himself and his wife for their lives, and the life of the longest liver of them, without impeachment of waste during the life of Thomas, and after their decease, to the use of the heirs of the body of the said Thomas, on the said Martha to be begotten; and for want of such issue, remainder

Streatfield v. Streatfield.

to the right heirs of Thomas. They had issue, Thomas (their only son), and two daughters, Margaret and Martha.

In the year 1716, upon the marriage of Thomas, the son, the father settled other lands (of which he was seised in fee), of the yearly value of £355, to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise £2,000 for younger children.

After the son's death [leaving a son called Thomas], Thomas, the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698 to the use of himself in fee, and in the year 1725 made his will, and thereby devised part of those lands (*a*) to his two daughters, Margaret and Martha; "And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversion, or remainder, not thereinbefore given or disposed of, situate in the counties of Kent, Surrey, or elsewhere, to trustees in trust for the plaintiff Thomas, his grandson, for life; remainder to his first and other sons in tail male; remainder to his daughters in tail; remainder to Margaret and Martha, with several remainders over." Then comes this clause: "And my will and meaning farther is, and I do hereby authorise and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson Thomas, so much as they shall think fit during his minority; and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates; which said monies, with interest arising therefrom, my will is be paid to my grandson Thomas at his age of twenty-one years, if he so long live; or, in case he dies before that age, then that the same shall be paid to my two daughters, Margaret and Martha, their executors, etc."

The testator died in the year 1730.

The question was, whether the settlement in 1698 was a proper execution of the articles of 1677? and if not, whether

(*a*) *I.e.*, *viz.* the lands at Sevenoake in Kent.

the general devise to the plaintiff should be taken as a satisfaction for what he was entitled to under the articles of 1677?

Mr. Solicitor-General, Mr. Browne, Mr. Fazakerley, and Mr. Noel argued for the plaintiff.

Mr. Attorney-General, Mr. Strange, and Mr. Peere Williams argued for the defendant.

Lord Chancellor Talbot.—It cannot be doubted but that, upon application to this Court for the carrying into execution the articles of 1677, the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul everything he had been doing: and the nature of the provision is strong enough for this purpose, without any express words, and I must, therefore, consider what was the operation of the deed of 1698, which is declared to be in performance of the true intent and meaning of the articles. If it be so, all is well; but if it be not, it only shows that the parties intended it so, but were mistaken. So was the case of *West* v. *Errissey* (*b*), where the articles were, by the House of Lords, decreed to be made good; and the same must be done in this case, if nothing intervenes to prevent it.

The settlement in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles; but to me it appears neither an actual satisfaction nor to have been intended as such. The grandfather had done that in 1698, which he apprehended to be a satisfaction for the articles; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration entirely new, the limitations being entirely different; and, therefore, it would be absurd to call this a satisfaction for another thing it hath nothing to do with, and to which it is no way relative.

The next thing to be considered is, the fine levied of the lands in question in the year 1723, by the grandfather; the intent whereof was to have the absolute ownership of those lands

(*b*) 2 P. W. 349; 1 Bro. P. C. 225, Toml. edit.

in him. And one reason why no application hath been made till now to have those articles carried into execution, might be that during the grandfather's life nobody was entitled to anything in possession under them.

Then comes the will in 1725, whereby he gives part of those lands, settled in 1698, to his daughters; thereby showing his apprehension to be, that, by a fine, he had given himself a power of disposing of them; and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles.

The next thing is the devise to the trustees for his grandson, the plaintiff, upon his attaining the age of twenty-one; and the question here is whether the general words shall ever pass lands not capable of the limitation in the will? And to that have been cited *Rose and Bartlett's Case* (*c*), and other cases; but they cannot influence the present case: for the testator had legally a power to dispose of those lands; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conusance, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands;* for there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other; I, therefore, *think his intent was clear to pass these lands by the will;* and if so, we must now consider what will be the effect of this will.

If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases; *but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take entirely but not partially under it: as was done in* Noys and Mordaunt's Case (*d*); *there being a tacit condition annexed*

(*c*) Cro. Car. 292.

(*d*) 2 Vern. 581.

to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made. So are the several cases that have been decreed upon the custom of London.

The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and, if after, then but an estate for life; and that he appears before the Court in a favourable light of being heir-at-law; but this will not alter the case. The estates which the testator has given him were undoubtedly in his power; he hath given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir-at-law; and surely it is as much in the power of the Court to make this bequest, thus limited to be a satisfaction, if the party will stand to the will, as in the other cases. Indeed, if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles; but that is because nothing is left them by the will; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is entitled to a large and ample provision by her marriage settlement: nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, *viz.*, nieces, at the same time that the mother (who hath an ample provision) would be left at large, and under no tie of maintaining her own children.

And so decreed (*e*) the plaintiff to have six months after he comes of age, to make his election, whether he will stand to the will or the articles. And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the

(*e*) See the decree, 1 Swans. 447; Reg. Lib. B. 1735, fol. 205.

articles, and which were devised to Margaret and Martha, to be conveyed to them in fee.

NOTES.

1. Election generally.
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1. Election generally.

Election is the obligation imposed upon a party by Courts of equity to choose between two inconsistent or alternative rights or claims in cases where there is clear intention of the person from whom he derives one that he should not enjoy both. Every case of election, therefore, presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both that one should be a substitute for the other. The party who is to take has a choice, but he cannot enjoy the benefit of both (*f*). The principle is stated thus in Jarman on Wills (*g*) : " That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it " (*h*). The principle of the doctrine of election is now well settled. It is founded on the presumption of a general intention in the authors of an instrument that effect shall be given to every part of it (*i*), but this presumption may be rebutted (*k*). It is applicable to every species of instrument, whether deed or will (*l*), and it applies

(*f*) Story (3rd ed.), p. 452; *Dillon* v. *Parker*, 1 Swans. 394, note (*b*); *Thellusson* v. *Woodford*, 13 V. 220.

(*g*) (6th ed.), 532; and see Farwell on Powers (3rd ed.), p. 429.

(*h*) See *Walpole* v. *Conway*, Barn. C. 159; *Kirkham* v. *Smith*, 1 Ves. Sen. 258; *Macnamara* v. *Jones*, 1 Bro. Ch. 481; *Blake* v. *Bunbury*, 4 Bro. Ch. 21; *Wintour* v. *Clifton*, 21 B. 447; 8 De G. M. & G. 641; *Codrington* v. *C.*, L. R. 7 H. L. 854, 861; *Pitman* v. *Crum Ewing*, [1911] A. C., at pp. 228, 233; *Brown* v. *Gregson*, [1920] A. C. 860, 868.

(*i*) *Hamilton* v. *H.*, [1892] 1 Ch., at p. 399.

(*k*) *Re Vardon's Trusts*, 31 Ch. D., at p. 279; *Re Wells*, 42 Ch. D., at p. 658; *Hamilton* v. *H.*, *supra*.

(*l*) Lord Redesdale, in *Birmingham* v. *Kirwan*, 2 Sch. & L. 444, 450.

to every kind of property—immediate, remote, contingent, real or personal (*m*); also to the interest of next-of-kin in the unascertained residue of an intestate's personal estate (*n*).

To illustrate the doctrine of election, suppose A, by will or deed, gives to B property belonging to C, and by the same instrument gives other property belonging to himself to C, a Court of equity will hold C to be entitled to the gift made to him by A, only upon the implied condition of his conforming with all the provisions of the instrument, by renouncing the right to his own property in favour of B; he must, consequently, make his choice, or, as it is technically termed, he is put to his election, to take either under or against the instrument; if C elects to take under, and consequently to conform with all the provisions of, the instrument, no difficulty arises, as B will take C's property, and C will take the property given to him by A; but if C elects to take against the instrument, that is to say, retains his own property and at the same time sets up a claim to the property given to him by A, an important question formerly arose whether he thereupon incurs a forfeiture of the whole of the benefit conferred upon him by the instrument, or is merely bound to make compensation out of it to the person who is disappointed by his election.

Compensation.—The principal case of *Streatfield* v. *S.* is a distinct authority for the doctrine of *compensation*, which may now be considered as fully established, and it may be laid down in accordance with Mr. Swanston's learned note to *Gretton* v. *Haward* (*o*), "1st. That, in the event of election to take against the instrument, Courts of equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. 2nd. That the surplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right" (*p*). The compensation

(*m*) *Wilson* v. *Townshend*, 2 V. 693; *Webb* v. *Shaftesbury*, 7 V. 480; *Morgan* v. *M.*, 4 Ir. Ch. R. 606; *Sadlier* v. *Butler*, 1 Ir. R. Eq. 415.

(*n*) *Cooper* v. *C.*, L. R. 7 H. L. 53; cf. *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

(*o*) 1 Swans. 409, 433, approved in *Ker* v. *Wauchope*, 1 Bli. 25. See the cases cited in the note to *Gretton* v. *Haward*, 1 Swans. 433, 445; Farwell (3rd ed.), at p. 437

(*p*) See also *Padbury* v. *Clark*, 2 Mac. & G. 298; *Greenwood* v. *Penny*, 12 B. 403; *Howells* v. *Jenkins*, 1 De G. J. & S. 617; *Grissell* v. *Swinhoe*, 7 Eq. 291; *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Schroder* v. *S.*, Kay, 578; *Howells* v. *Jenkins*, 1 De G. J. & S. 617; *Cooper* v. *C.*, L. R. 7 H. L. 53.

is a charge upon the benefits received *under* the instrument (*q*). Where a beneficiary under a will, being put to his election, elects to take against the will, the amount of the compensation is to be ascertained at the date of the death of the testator and not at the time when the election is made (*r*).

And after the death of a person who has elected to take against an instrument, compensation will be directed to be made out of his estate to the party who has sustained a loss thereby, so far as such loss does not exceed the benefit taken under the instrument by the person making such election (*s*), and such party may now commence an action for damages or compensation (*t*). Where several persons were put to their election as between benefits under a settlement and a will, and they all elected to take against the will, it was held that they were respectively bound to make compensation to other persons so electing, as well as to persons who took under the will only; also that all compensation so paid to any person electing to take against the will must be included in the benefits received by him under the will (*u*).

Where a person who elects to take a fund against an instrument has been previously receiving money under it, he must on making his election repay such money, and the persons interested under the trusts of the instrument have a lien for the repayment thereof on the fund which he elects to take (*x*).

As the doctrine of election depends upon compensation, it follows that it will not be applicable when made contrary to the instrument unless there be a *free and disposable fund* passing thereby from which compensation can be made. Thus it was held, in *Bristow* v. *Warde* (*y*), that where, under a power to appoint to children, the father made an appointment to persons not objects of the power, any child might set it aside and claim as in default of appointment, and also take a specific share appointed to him.

(*q*) *Pickersgill* v. *Rodger*, 5 Ch. D. 163; but not upon interests taken against a will: *Greenwood* v. *Penny*, 12 B. 403.

(*r*) *Re Hancock*, [1905] 1 Ch. 16; *Re Macartney*, [1918] 1 Ch., at p. 306.

(*s*) *Rogers* v. *Jones*, 3 Ch. D. 688, 690; *Fytche* v. *F.*, 19 L. T. 343; *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Seton* (7th ed.), 1527-9.

(*t*) *Rogers* v. *Jones*, 7 Ch. D. 345.

(*u*) *Re Booth*, [1906] 2 Ch. 321.

(*x*) *Codrington* v. *Lindsay*, L. R. 8 Ch. 578; *Codrington* v. *C.*, L. R. 7 H. L. 854; *Carter* v. *Silber*, [1891] 3 Ch. 553; *S. C.*, reversed on other grounds, [1893] A. C. 360; *Hamilton* v. *H.*, [1892] 1 Ch. 396.

(*y*) 2 V. 336, 350; Farwell (3rd ed.), at p. 438.

Streatfield v. Streatfield.

"The doctrine of election," said Loughborough, C., "never can be applied, but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of, to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person, which can be made a compensation for what the testator takes away. That cannot apply to this case, where no part of his property is comprised in the will but that which he had power to distribute" (*z*).

Upon the same principle in the case of a married woman, to whom an interest with a restraint on anticipation is given by the same instrument as that which gives rise to a question of election, the doctrine of election does not apply, as the nature of her interest in the property, to be relinquished by way of compensation, has by the terms of the instrument been made inalienable (*a*). In *Hamilton* v. *H.* (*b*), on the marriage of a lady in 1879, she being an infant, the settlement contained a covenant to settle after-acquired property, and gave her certain interests, some without power of anticipation. She was divorced, and brought an action to avoid the covenant. She married again before trial, and her second husband was made co-plaintiff. Held, that if she elected against the settlement the interests as to which she was not restrained were to be applied in compensating the persons disappointed by such election, but that she could not give up the interests subject to restraint. Held also, following *Codrington* v. *C.* (*c*), that the date of the action to repudiate was not the date of her election, but that she was still entitled to exercise that right, within a time to be limited.

In *Re Tongue* (*d*) the testatrix bequeathed certain stock to her nephews and nieces and gave her residuary estate to her four daughters in equal shares, each daughter's share being settled upon her for life with a restraint upon anticipation during coverture and after her death to her children. At the death of testatrix three of her daughters were married and one was a spinster. The stock bequeathed by the will belonged in fact to the daughters. It was

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(*z*) See also *Box v. Barrett*, 3 Eq. 244; *Pickersgill* v. *Rodger*, 5 Ch. D. 163; *Re Fowler's Trusts*, 27 B. 342; and as to heirlooms, *Re Chesham*, 31 Ch. D. 466.

(*a*) *Smith* v. *Lucas*, 18 Ch. D. 531; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Re Wheatley*, 27 Ch. D. 606; *Re Vardon's Trusts*, (C. A.) 31 Ch. D. 275.

(*b*) [1892] 1 Ch. 396.

(*c*) L. R. 7 H. L. 854.

(*d*) [1915] 1 Ch. 390.

held that, in the case of the spinster daughter, a case of election arose, whether she would claim her share of the stock or her interest in the residuary estate. In *Re Hargrove* (*e*), the testator appointed certain settled funds to go with his general residuary estate and gave one-third thereof to his daughter Eleanor for life with a restraint upon anticipation (the restraint not being in terms limited to the period of coverture) and after her death to her children, and made similar provisions in favour of another daughter. The issue of daughters were not within the power, and accordingly subject to the life interests the settled funds went as unappointed. Held, that Eleanor being a spinster must elect.

A person will not be obliged to elect between benefits conferred upon him by an instrument, and an interest which he takes derivatively from another, who has elected to take in opposition to the instrument. Thus it was held, that a husband might be tenant by the curtesy of an estate tail, which his wife had elected to take in opposition to a will under which he had accepted benefits : for as the wife made complete compensation to the persons disappointed by her election, there could not be a second election, because in fact there was no one entitled to compensation (*f*).

Nor will a person be compelled to elect between a benefit conferred upon him by an instrument, and an interest which he took adversely to the instrument and derivatively from the real owner, who took no benefit under the instrument (*g*).

If, however, the title to certain property, whether derivative or otherwise, were vested in the owner before the testator's death, the owner must elect between benefits conferred upon him by the testator's will and that property if the testator has devised it to others (*h*).

It seems to be doubtful whether the doctrine of election applies to grants from the Crown, for the Crown is always in existence and can always be applied to, to set right the grant (*i*).

Where, however, two persons A and B joined in a petition to the Crown, representing an estate to have escheated, and procured a grant of it to be made to them, it was held that the assignees of A

(*e*) [1915] 1 Ch. 398.

(*f*) *Cavan* v. *Pulteney*, 2 V. 544.

(*g*) *Howells* v. *Jenkins*, 2 John. & H. 706; and see *Grissell* v. *Swinhoe*, 7 Eq. 291.

(*h*) See *Cooper* v. *C.*, *supra*; *Brodie* v. *Barry*, 2 V. & B. 127; *Bennett* v. *Houldsworth*, 6 Ch. D. 671.

(*i*) *Cumming* v. *Forrester*, 2 J. & W. 334, *per* Plumer, M.R., at p. 345.

could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest (*k*).

In order to raise a case of election, at any rate, in the case of a will, there must appear in the will itself a clear intention on the part of the testator to dispose of that which is not his own (*l*) : and it is immaterial whether he knew the property not to be his own, or by mistake conceived it to be his own; for, in either case, if the *intention to dispose* of it appears, his disposition will be sufficient to raise a case of election (*m*).

It is immaterial that a party put to his election by a will had after the date thereof at the instance of the testator put into settlement property belonging to himself, which the testator affects to dispose of by his will; the value of such property must be brought into account (*n*).

Moreover, though part of the benefits proposed by a testator to be conferred upon another may fail, what remains will be sufficient to constitute a case for election (*o*).

The mere recital in a will that a party is entitled to certain property, but not declaring the intention of the testator to give it to him, will not be sufficient to raise a case of election (*p*). So in *Box* v. *Barrett* (*q*), under a settlement the four daughters of a testator took equal shares subject to his life interest. The testator, by his will, recited that under the settlement his *two daughters, Ellen and Emily, would become entitled to certain hereditaments*, and that in making his will he had taken that into consideration, and had not devised them so large a share under his will as he would have done had they not been so entitled. He then devised to his daughters Ellen and Emily certain estates, and

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(*k*) *Cumming* v. *Forrester*, *supra*.

(*l*) *Forrester* v. *Cotton*, 1 Eden, 532; *Judd* v. *Pratt*, 13 V. 168, 15 V. 390; *Dashwood* v. *Peyton*, 18 V. 27; *Blake* v. *Bunbury*, 4 Bro. Ch. 21; *Rancliffe* v. *Parkyns*, 6 Dow, 149, 179; discussed in *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1; *Dillon* v. *Parker*, 1 Swans. 359; *Jervoise* v. *J.*, 17 B. 566; *Padbury* v. *Clark*, 2 Mac. & G. 298; *Lee* v. *Egremont*, 5 De G. & Sm. 348; *Wintour* v. *Clifton*, 21 B. 447, 8 De G. M. & G. 641; and *Stephens* v. *S.*, 3 Drew. 697; 1 De G. & J. 62; *Fox* v. *Charlton*, 10 W. R. 506; *Box* v. *Barrett*, 3 Eq. 244; *Re Harris*, [1909] 2 Ch. 206; *Re Sullivan*, [1917] 1 Ir. R. 38.

(*m*) *Whistler* v. *Webster*, 2 V. 370; *Thellusson* v. *Woodford*, 13 V. 221; *Welby* v. *W.*, 2 V. & B., 199; *Whitley* v. *W.*, 31 B. 173; *Coutts* v. *Acworth*, 9 Eq. 519; *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358; *Re Booker*, [1886] W. N. 18.

(*n*) *Middleton* v. *Windross*, 16 Eq. 212.

(*o*) *Newman* v. *N.*, 1 Bro. Ch. 186.

(*p*) *Dashwood* v. *Peyton*, 18 V. 41; *Forrester* v. *Cotton*, 1 Eden, 532, 535; *Blake* v. *Bunbury*, 1 V. 514, 523.

(*q*) 3 Eq. 244.

to his other daughters, Edith and Eliza, certain other estates of much larger value. *The will did not purport to dispose of or affect the settled estates.* It was held by Romilly, M.R., that as the will did not purport to make any disposition of the settled estates, and was only made under a mistaken impression, Edith and Eliza were not put to their election (*r*).

The difficulty of sustaining a case of election is greater where the testator has a partial interest in the property dealt with than where he purports to devise an estate in which he has no interest at all (*s*). For if the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he is entitled (*t*).

Where, however, a testator entitled only to part of an estate uses words in devising it which show clearly that he intended to pass the entirety, if the owner of the other part takes other benefits by the will, he will be put to his election : as, for instance, where a person entitled only to a moiety of a house devises it as " all my messuage, now on lease to A and in his occupation " (*u*), especially if there are also directions to repair the property specifically devised (*x*), or if the testator in another part of the will correctly described a moiety, when it was his intention to give a moiety (*y*). And where the wife of the testator alone was entitled to a particular property, a devise of it as " my interest in the A property " will put the wife to her election (*z*). And a specific devise by a particular description may be considered a sufficient indication of an intention of a partial owner of property to pass the entirety thereof (*a*). So where a sum of £10,000 Consols was in settlement in trust for two sisters for life, and after their deaths as to two-thirds of the capital in trust for their brother, and as to one-third in trust for the two sisters; and the brother

(*r*) See also *Langslow* v. *L.*, 21 B. 552; *Blacket* v. *Lamb*, 14 B. 482; *Re Fowler's Trust*, 27 B. 362.

(*s*) *Howells* v. *Jenkins*, 2 J. & H. 706, 713; *Rancliffe* v. *Parkyns*, 6 Dow, 185; *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1.

(*t*) *Maddison* v. *Chapman*, 1 John. & H. 470; *Re Bidwell's Settlement*, 11 W. R. 161; *Galvin* v. *Devereux*, [1903] 1 Ir. R. 185; *Henry* v. *H.*, 6 Ir. R. Eq. 286.

(*u*) *Padbury* v. *Clark*, 2 Mac. & G. 298.

(*x*) *Ibid.*

(*y*) *Ibid.*

(*z*) *Whitley* v. *W.*, 31 B. 173; but see *Read* v. *Crop*, 1 Bro. Ch. 492; *Wintour* v. *Clifton*, 8 De G. M. & G. 644; *Grosvenor* v. *Durston*, 25 B. 97; *Usticke* v. *Peters*, 4 Kay & J. 437; *Galvin* v. *Devereux*, [1903] 1 Ir. R. 185.

(*a*) *Fitzsimons* v. *F.*, 28 B. 417; *Howells* v. *Jenkins*, 1 De G. J. & S. 617; *Miller* v. *Thurgood*, 33 B. 496; *Wilkinson* v. *Dent*, L. R. 6 Ch. 339.

bequeathed "the whole of his property" to trustees as to part on certain trusts for his sisters, afterwards bequeathing the property "including the £10,000 trust money" to other persons, it was held that the sisters must elect between the benefits given them by the will and their interest in the £10,000 Consols (*b*).

Where a testator is entitled only to a reversion in lands devised, the question sometimes arises whether he intended a devise to be confined to his own estate. *Prima facie*, the testator would be understood to refer only to what he had power to dispose of. He may, however, show a contrary intention; if, for instance, he has either devised the land in question upon limitations, or has attempted to confer powers on the devisees which could not take effect if only a reversionary interest passed, then the intention to include the immediate interest would be sufficiently indicated to raise a case of election (*c*). So too a direction that an annuity is to be paid to a person for life, out of lands of which the testator has only the reversion, sufficiently indicates an intention to dispose of the whole (*d*). But such indications of intention will not prevail against an express *confirmation* of the settlement creating the estates, which come before the testator's reversion (*e*). A confirmation, however, of a part of the settlement leaves the remainder unconfirmed (*f*).

A devise of an estate does not *per se* import an intention to devise it free from incumbrances to the devisee, so as to put the incumbrancers taking benefits under the will to their election (*g*). The intention to do so must appear conclusively from the words of the will, as, for instance, if the testator repudiates the instrument creating the charge, and the dispositions of the will are inconsistent with that instrument, it will show that he intended the property to pass free from the charge (*h*). So if a testator entitled to an estate, subject to an incumbrance, secured by a long term, devise such estate for a term to take effect *immediately* upon the death of the testator, and for the *immediate* purpose of raising money

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(*b*) *Swan* v. *Holmes*, 19 B. 471.

(*c*) *Welby* v. *W.*, 2 V. & B. 187, 198; *Wintour* v. *Clifton*, 8 De G. M. & G. 641.

(*d*) *Usticke* v. *Peters*, 4 Kay & J. 437, 455.

(*e*) *Rancliffe* v. *Parkyns*, 6 Dow, 149; discussed in *Minchin* v. *Gabbett*, [1896] 1 Ir. R. 1.

(*f*) *Blake* v. *Bunbury*, 1 V. 514.

(*g*) *Stephens* v. *S.*, 1 De G. & J. 62; 3 Drew. 697; *Henry* v. *H.*, 6 Ir. R. Eq. 286; *Maddison* v. *Chapman*, 1 John. & H. 470. Cf. *Re Williams*, [1915] 1 Ch. 450.

(*h*) *Sadlier* v. *Butler*, 1 Ir. R. Eq. 413, 423.

for the payment of annuities and legacies, the incumbrancers deriving other interests under the will, if they take by it, must give effect to it, and permit the estate to go in the new channel free from incumbrances as the testator intended (*i*).

Parol evidence, *dehors* the will, is not admissible for the purpose of showing that a testator considering property to be his own, which did not actually belong to him, intended to comprise it in a general devise or bequest (*k*).

Where a testator holds property with another person in joint tenancy, since on his death without severance the whole would go to the surviving joint-tenant, it would not pass by a general bequest in the testator's will to a third party so as to raise a case of election against the surviving joint-tenant taking other benefits by the will. Thus, where a testator, both before and after making his will, transferred certain Government stock unto the names of himself and his wife and by his will made a general bequest of all his funded property or estate of whatsoever kind to trustees for his wife for her life, and after her decease as therein mentioned, it was held that the will did not purport to dispose of the stock in terms sufficiently clear and distinct, or to put the wife upon her election (*m*); for in order to raise a case of election in such a case the stock in question must be specifically and clearly referred to (*n*).

But a testator may in his will itself show an intention under a general devise to dispose of lands which are not absolutely his own, as for instance by describing them as being in the occupation of himself or his tenants (*o*). So if a testator devise land in a particular locality, if there is any property of the testator answering the description it will be confined to that (*p*).

Exclusion of Election.—The rule of election, the subject of this note, which depends, as before observed, upon an implied condition, will not be excluded by the parties being expressly put to their

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(*i*) *Blake* v. *Bunbury*, 1 V. 514, 523.

(*k*) *Doe* v. *Chichester*, 4 Dow, 76, 89, 90; and see *Pole* v. *Somers*, 6 V. 322; *Druce* v. *Denison*, 6 V. 402; *Clementson* v. *Gandy*, 1 Keen, 309.

(*m*) *Dummer* v. *Pitcher*, 2 My. & K. 262; *Blommart* v. *Player*, 2 Si. & St. 597; *Crabb* v. *C.*, 1 My. & K. 511; *Smith* v. *Lyne*, 2 Y. & C. C. C. 345; *Allen* v. *Anderson*, 5 Ha. 163; *Seaman* v. *Woods*, 24 B. 372; *Re Harris*, [1909] 2 Ch. 206.

(*n*) *Coates* v. *Stevens*, 1 Y. & C. Ex. 66; *Grosvenor* v. *Durston*, 25 B. 97; *Shuttleworth* v. *Greaves*, 4 My. & C. 38; *Att.-Gen.* v. *Fletcher*, 5 L. J. Ch. 75.

(*o*) See *Honywood* v. *Forster*, 30 B. 14.

(*p*) *Rancliffe* v. *Parkyns*, 6 Dow, 149; *Maddison* v. *Chapman*, 1 John. & H. 470.

election, as between the benefits conferred upon them and sums due to them from the person conferring such benefits. Thus in *Wilkinson* v. *Dent* (*q*) a testatrix devised "all and singular the estate and mines of Aroa" to trustees in trust for sale, and gave to T. D. £10,000, which was to be taken in full satisfaction of any sums which she might owe him at her decease, and to W. D. £3,000, which she declared was to be taken in satisfaction of any rent-charge out of a certain part of her real estate. Her will contained the usual devise of trust and mortgage estates. She was in possession of the entirety of the Aroa estate, but was owner only of one moiety, being in possession of the other moiety by virtue of a mortgage, the money due upon which was subject to trusts, under which T. D. and W. D. on her death became entitled, each to one fifth. It was held that T. D. and W. D. were put to their election between the benefits they took under the will and their shares in the mortgage money. "The question," said James, L.J., "is, whether there is testamentary bounty to persons whose estate and right are, under another part of the will, interfered with. It appears to me clear, that this question must be answered in the affirmative, though, before the amount of the bounty can be ascertained, the amount of the claims which the legatees had against the testatrix must be ascertained" (*r*).

But the ordinary doctrine of election may be excluded by an expression of intention by a testator that only one of several gifts, to an object of his bounty, is conditional on his giving up what a testator purports to take away from him. For instance, if a testator had an eldest son, owner of a bit of property, and it would be convenient that this bit of property should go along with a property which the testator is devising to his second son; so the testator devises this bit of property to the second son; and amongst other gifts to his eldest son, he gives him a piece of property which he states in his will to be in lieu of his bit of property which the testator purported to take away from him. In such case, the eldest son would merely be put to his choice between those two bits of property (*s*).

(*q*) L. R. 6 Ch. 339.

(*r*) See also *Coutts* v. *Acworth*, 9 Eq. 519; *Synge* v. *S.*, L. R. 9 Ch. 128; and cf. *Turner* v. *T.*, [1911] 1 Ch. 716.

(*s*) See *East* v. *Cook*, 2 Ves. Sen. 30, as explained by James, L.J., in *Wilkinson* v. *Dent*, *supra*. See also *Bor* v. *B.*, 3 Bro. P. C., Toml. edit. 167; *Fytche* v. *F.*, 19 L. T. 343; *Coote* v. *Gordon*, 11 Ir. R. Eq. 180; and see *Brown* v. *Parry*, cited Jarman on Wills (6th ed.), p. 552.

2. Election in Cases of Deeds.

The question of election principally arises in "cases of wills, because deeds being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration expressed requires" (*t*). Election under deeds is of a different kind to that arising under wills, for there need not be in the case of deeds a clear intention on the part of the settlor or others to dispose of property which was not his own; the principle upon which cases of election are raised in deeds being that which Lord Redesdale in *Birmingham* v. *Kirwan* (*u*) states to be the general foundation of the law of election, *viz.*, that a person cannot "approbate and reprobate" under the same instrument. Thus, if a person comes in directly under a settlement, and asks to have the benefit of such of its provisions as give him an advantage, and at the same time claims adversely to what was intended to be the rest of the settlement, because it was not binding, then a case of election arises. In *Brown* v. *B.* (*x*) marriage articles executed when a lady was a minor contained a covenant by the husband to settle her interest in real and personal estate, including after-acquired property, on the usual trusts; and she died without having confirmed the articles, leaving her husband surviving, and an only child, her heiress-at-law, who claimed an interest under the articles in the personal estate and also claimed the real estate attempted to be settled as heiress-at-law of her mother. "The plaintiff," said Romilly, M.R., "comes in and claims directly under the limitation of the personal estate for her benefit under the settlement and claims the real estate adversely to the settlement on the ground that in the event the settlement did not bind it. I think, therefore, that she claims beneficially under the settlement directly, and that consequently she must elect whether she will take adversely to it or under it; if the latter, she must give effect to the whole of it as far as she can" (*y*).

With regard to marriage settlements, James, L.J., laid down this simple rule in *Codrington* v. *Lindsay* (*z*): "The only safe rule

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(*t*) *Per* Lord Redesdale, in *Birmingham* v. *Kirwan*, 2 Sch. & L. 444; *Codrington* v. *C.*, L. R. 7 H. L., at p. 867.

(*u*) 2 Sch. & L. 444, 448.

(*x*) 2 Eq. 481.

(*y*) See *Anderson* v. *Abbott*, 23 B. 457; *Willoughby* v. *Middleton*, 2 John. & H. 344; *Codrington* v. *C.*, L. R. 7 H. L. 854; *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358; *Hamilton* v. *H.*, [1892] 1 Ch. 396.

(*z*) L. R. 8 Ch., at p. 592; affirmed L. R. 7 H. L. 854.

to guide the Court is to consider everything that is brought or expressed to be brought into settlement by anybody from any source as one aggregate trust fund. So considering it, it seems to me very easy and very right to read all the trusts thus : out of the aggregate property settled A is to have so much and no more, B so much and no more, the issue to have such interests and no more or other. Then if by paramount title A or B or any of the issue takes out of the aggregate something other than the share expressed to be given, he or she must take that in full satisfaction of the expressed share or interest"; and he more than doubted the propriety of *Campbell* v. *Ingilby* (*a*), which was the only exception he thought to this rule.

The principle of approbation and reprobation has been applied (*b*) to voluntary deeds (*c*); to cases of contract for valuable consideration resting in articles (*d*); to contracts for value completely executed by conveyance and assignments (*e*).

3. Election in Cases of Wills.

Where by the same will several gifts are given, some beneficial, others onerous, but all of them the property of the testator, in the absence of the intention of the testator to make the acceptance of the burden a condition of the benefit (*f*) the devisee may take what is beneficial and reject what is onerous (*g*). But where the question arises upon a single and undivided gift, such gift is *prima facie* evidence that it was the testator's intention that the gift should be one, and that it was the testator's intention that the legatee should either take it all or take none of it (*h*).

But even in such a case the Court might sometimes be able to discover some subtle indication of an intention that the legatee

(*a*) 21 B. 567; 1 De G. & J. 393, affirmed on other grounds; and see Romilly, M.R.'s, explanation in *Brown* v. *B.*, 2 Eq. 481, of his decision in *Campbell* v. *Ingilby*, *supra*.

(*b*) *Codrington* v. *Lindsay*, L. R. 8 Ch. 587.

(*c*) *Llewellyn* v. *Mackworth*, Barn. C. 445; *Anderson* v. *Abbott*, 23 B. 457.

(*d*) *Savill* v. *S.*, 2 Coll. Ch. R. 721; *Brown* v. *B.*, 2 Eq. 481.

(*e*) *Bigland* v. *Huddleston*, 3 Bro. Ch. 285 (n.); *Chetwynd* v. *Fleetwood*, 4 Bro. P. C. 435, edit. 1784; *Green* v. *G.*, 2 Mer. 86; *Bacon* v. *Cosby*, 4 De G. & Sm. 261; *Mosley* v. *Ward*, 29 B. 407.

(*f*) *Talbot* v. *Radnor*, 3 My. & K. 252; *Green* v. *Britten*, 42 L. J. Ch. 187; *Fairclough* v. *Johnstone*, 16 Ir. Ch. 442; *Warren* v. *Rudall*, 1 John. & H. 13; *Long* v. *Kent*, 13 W. R. 961.

(*g*) *Andrew* v. *Trinity Hall*, 9 V. 525; *Moffett* v. *Bates*, 3 Sm. & G. 468; *Warren* v. *Rudall*, 1 John. & H. 1; *Aston* v. *Wood*, 22 W. R. 893.

(*h*) *Guthrie* v. *Walrond*, 22 Ch. D. 573, 577; *Green* v. *Britten*, 42 L. J. Ch. 187; *Re Kensington*, [1902] 1 Ch. 203.

should be at liberty to take part of the gift and leave the rest (*i*). In *Syer* v. *Gladstone* (*k*) a freehold house and the furniture therein were left to A and B for life. The house was mortgaged for more than its value; A and B were held entitled to use the furniture, without keeping down the interest on the mortgage. But this decision, it would seem, can only be upheld upon the ground that, as a matter of construction, there were separate and distinct gifts of the house and furniture (*l*).

The rule as to election is to be confined to a gift under a will, and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will as in the case of deeds (*m*). In a recent case (*n*) a testator bequeathed £3,000 Colonial Stock to his daughter M., and gave his shares in company A to his seven children, including M. The testator held nearly all the shares in company A, and company A owned 90 per cent of the share capital of company B. The testator was trustee of the Colonial Stock for company B, and the bequest of the same to M., therefore, failed. Accordingly, in the result, the greater part of this stock increased the value of the shares in company A bequeathed to the seven children. It was held that the children must make compensation to M. in respect of the bequest to her of the Colonial Stock.

Although, under the old law, a devise to the heir was in a certain sense inoperative, as he took by *descent* as heir, and not by purchase as devisee, it has been held, ever since the decision of *Noys* v. *Mordaunt*, *supra*, p. 371, to be a sufficient gift to him of the testator's property to raise a case of election, should the testator devise or bequeath to another property belonging to the heir (*o*); *a fortiori* would the heir be put to his election since the Act for the Amendment of the Law of Inheritance (*p*), by which lands devised by the will of a testator dying after December 31, 1833, to the heir, went to him as devisee by purchase, and not by descent (*q*).

(*i*) *Per* Fry, J., in *Guthrie* v. *Walrond*, 22 Ch. D. 577.

(*k*) 30 Ch. D. 614; and see additional report, [1902] 1 Ch. 211 (n.).

(*l*) See *Re Hotchkys*, 32 Ch. D. 408, 418, 419; *Frewen* v. *Law Life Assurance Society*, [1896] 2 Ch. 511, 517; *Re Kensington*, [1902] 1 Ch. 203, 210, 211.

(*m*) See *Wollaston* v. *King*, 8 Eq. 165; *Wallinger* v. *W.*, 9 Eq. 301; *Bizzey* v *Flight*, 3 Ch. D. 269; *Warren* v. *Rudall*, 1 John. & H. 1.

(*n*) *Re Macartney*, [1918] 1 Ch. 300.

(*o*) *Welby* v. *W.*, 2 V. & B. 190; *Anon.*, Gilb. 15; *Thellusson* v. *Woodford*, 13 V. 209.

(*p*) 3 & 4 Will. 4, c. 106; see now section 51 of A. E. Act, 1925, and section 132 of L. P. Act, 1925.

(*q*) See *Schroder* v. *S.*, Kay, 578.

Streatfield v. Streatfield.

The heir of immovable property, situate out of England, becoming entitled to it in consequence of the will by which it is devised to another not being conformable to the solemnities required by the *lex situs*, and taking also under the same will real or personal property in this country, will be compelled, if the intention to dispose of land out of England is clear, to elect between the heritable property which has descended to him as heir and the benefits given to him by the will (*r*). But if the intention does not so appear, if for instance the devise is general, then *secus* (*s*).

4. Election in Appointments under Powers.

The doctrine of election is applicable to appointments under a power. Thus, where an express appointment is made to a stranger to the power, which is therefore void, and a benefit is conferred by the same instrument upon a person entitled in default of appointment, the latter will be put to his election (*t*).

If the donee of a non-exclusive power of appointment among a class to whom this property is limited in default of appointment appoints exclusively to one object, and by the same instrument confers benefits on the others, the latter will be put to their election. Thus where a person has power to appoint to two, "and he appoints to one only, and gives a legacy to the other, that is a case of election" (*u*). So where a testator, having power under a settlement to appoint the settled hereditaments to children of his first marriage only, appointed the settled hereditaments (describing them as his own property) in favour of a son of the first marriage, subject to a charge in favour of his other children, including the children of his second marriage, and he devised property of his own to the same son, subject to the same charges in favour of his other children "so as to equalise the shares of all his children in all his property,"

(*r*) *Brodie* v. *Barry*, 2 V. & B. 127; *Orrell* v. *O.*, L. R. 6 Ch. 302; *M'Call* v. *M'C.*, Dr. 283; *Harrison* v. *H.*, L. R. 8 Ch. 342; and see *Dewar* v. *Maitland*, 2 Eq. 834 (land in St. Kitts); *Douglas-Menzies* v. *Umphelby*, [1908] A. C. 224; *Re Ogilvie*, [1918] 1 Ch. 492; *Brown* v. *Gregson*, [1920] A. C. 860. Cf. *Re de Virte*, [1915] 1 Ch. 920.

(*s*) *Johnson* v. *Telfourd*, 1 Russ. & M. 244; *Allen* v. *Anderson*, 5 Ha. 163; *Maxwell* v. *M.*, 2 De G. M. & G. 705; *Lamb* v. *L.*, 5 W. R. 720; *Maxwell* v. *Hyslop*, 4 Eq. 407; *Baring* v. *Ashburton*, 54 L. T. 463 (land in France).

(*t*) Sug. Pow. (8th ed.), 578. This relates to cases before the Exclusive Appointments Act, 1874. Farwell (3rd ed), pp. 430 *et seq.*; *Whistler* v. *Webster*, 2 V. 367; *Reid* v. *R.*, 25 B. 469; *Tomkyns* v. *Blane*, 28 B. 422; *Re Fowler*, 27 B. 362; *Pitman* v. *Crum Ewing*, [1911] A. C. 217.

(*u*) Sug. Pow. (8th ed.), 589; *Wollen* v. *Tanner*, 5 V. 218; *Vane* v. *Dungannon*, 2 Sch. & L. 117.

it was held by Fry, J., that a case of election was raised in favour of the children of the second marriage (*x*).

Where the donee of a power makes a valid appointment to objects of the power, and by a subsequent instrument after the expiration or exhaustion of the power purports to revoke the former appointment, reappointing in favour of another object, and by the same instrument gives benefits to the former appointees, the latter will be put to their election (*y*). But where a second appointment made in exercise of the power gives larger shares in the appointed fund only partially appointed by the first appointment in favour of both of the objects benefiting by the former appointment and other objects of the power, no question of election arises (*z*).

Where a person having a power to appoint delegates the power (which he has really no right to do) to another by his will and thereby also confers benefits upon the objects of the power, they cannot retain the benefits given to them by the will and also claim the property to which the power so purported to be delegated relates (*a*).

The doctrine of election is also applicable where there is a revocation in excess of the power, and benefits are conferred upon the person disappointed by such revocation. Thus where an appointment was made of the interest of a fund to a person for life irrevocably, and after his decease the fund was appointed to others with power to the appointor, by deed or will, to revoke the appointments subsequent to the life interest, and the appointor afterwards, supposing she had complete dominion over the fund, revoked *all* the appointments before made, giving the person entitled to the interest of the fund for life part of it absolutely, and the remainder of the fund to others, the person to whom, under the first appointment, a life interest was given in the whole fund was compelled to elect between the life interest in the whole fund and his interest in part of the fund given to him absolutely under the second appointment (*b*). And it was directed that the costs should be borne by each share in proportion. In other words, the taker of each share was to bear the proportion of the burthen falling to the share he

(*x*) *White* v. *W.*, 22 Ch. D. 555; distinguishing *Carver* v. *Bowles*, 2 Russ. & M. 304, and *Woolridge* v. *W.*, 1 John. 63.

(*y*) See *Cooper* v. *C.*, L. R. 7 H. L. 53; Farwell (3rd ed.), p. 432.

(*z*) See *England* v. *Lavers*, 3 Eq. 63, explained in *Re Tancred's Settlement*, [1903] 1 Ch. 715. Cf. *Re Keon*, 3 L. R. Ir. 228.

(*a*) *Ingram* v. *I.*, *cited* 1 Ves. Sen. 259; cf. *Re Stevens*, 134 L. T. Jo. 83.

(*b*) *Coutts* v. *Acworth*, 9 Eq. 519; Farwell (3rd ed.), p. 433.

took (*c*). In no instance, however, has a case of election been raised where a testator gave no property absolutely his own to an object of the power out of which, in the event of his not acquiescing in an appointment by the donee to a person not an object of the power, the latter could be compensated (*d*).

Neither will the non-execution of the power upon an erroneous impression stated in the will that by its non-execution one person who is a legatee will divide the fund, the subject of the power, equally with another, raise a case of election (*e*).

No case of election arises between two appointments under distinct limited powers. Thus, in *Re Applin's Trusts* (*f*), A had power to appoint by will a fund to any one or more of his children. He had under a distinct instrument power to appoint another fund amongst his children, to any one of them, but not exclusively, and they were to take equally in default of appointment. He had five children. By his will he exercised the first power in favour of S., one of his children, and the second in favour of two others of his children. The second power was accordingly badly exercised, and S. took a share in default of appointment. It was held that no case of election was raised against S. (*g*).

Where, moreover, there is an attempt to execute a power in violation of the rules of law, it seems that no question of election will arise. Thus where a person makes an appointment (which is void by reason of offending the rule against perpetuities (*h*), or the rule against limiting an estate to an unborn child of an unborn person (*i*)) to a person not an object of this power, although by the same instrument he gives property of his own to the persons entitled in default of appointment, the latter will not be compelled to elect, for in such case the instrument must be read as if the invalid appointment were not in it at all. Where a testator, domi-

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(*c*) 9 Eq., p. 523.

(*d*) See *Re Fowler's Trusts*, 27 B. 362; *Armstrong* v. *Lynn*, 9 Ir. R. Eq. 186.

(*e*) *Langslow* v. *L.*, 21 B. 552.

(*f*) 13 W. R. 1062.

(*g*) See also *Re Fowler's Trusts*, 27 B. 362.

(*h*) *Wollaston* v. *King*, 8 Eq. 165, 175; *Re Warren's Trusts*, 26 Ch. D. 208, 219; *Re Mandcock's Trusts*, 23 L. R. Ir. 34; *Re Oliver's Settlement*, [1905] 1 Ch. 191; *Re Beale's Settlement*, [1905] 1 Ch. 256; *Re Wright*, [1906] 2 Ch. 288; *Re Nash*, [1910] 1 Ch. 1, overruling *Re Bradshaw*, [1902] 1 Ch. 436.

(*i*) *Re Nash*, [1909] 2 Ch. 450; [1910] 1 Ch. 1. The rule of law prohibiting the limitation after a life interest in land to an unborn person of an interest in land to the unborn child or other issue of an unborn person has been abolished by the L. P. Act, 1925, s. 161, without prejudice to any other rule relating to perpetuities.

ciled abroad, makes a will which purports to dispose of real estate in England but is ineffectual for such purpose, the heir is not put to his election between such realty and other benefits given him by the will (*k*).

Similarly where a person appoints simply to objects of the power, and gives them property of his own, subsequently directing them to settle the property so appointed on persons not objects of the power, the instrument of appointment will be read as if it contained no such direction, and no case of election will arise (*l*). But, where there is a clause of forfeiture of the legacies on non-compliance with such direction, full effect will be given thereto (*m*).

Mere precatory words requesting appointees, objects of the power, to leave the fund appointed to others, not objects of the power, will not raise a case of election (*n*).

5. Election—(A) Compulsory; (B) Implied.

(A) Compulsory.—Election may be compulsory, as where a person is compelled to elect by a judgment of the Court. Persons compelled to elect are entitled previously to ascertain the relative value of their own property and that conferred upon them, and time will be allowed to them for that purpose (*o*); and as to the apportionment of debts upon different funds, see *Cooper* v. *C.* (*p*).

An election made under a mistaken impression will not be binding, for in all cases of election the Court, while it enforces the rule of equity that the party shall not avail himself of both his claims, is anxious to secure to him the option of either, and not to hold him concluded by equivocal acts performed, perhaps, in ignorance of the value of the funds (*q*).

In *Re Ogilvie* (*r*) a testatrix domiciled in England devised land

(*k*) *Re Virte*, [1915] 1 Ch. 920.

(*l*) *Carver* v. *Bowles*, 2 Russ. & My. 301; *Blacket* v. *Lamb*, 14 B. 482; *Woolridge* v. *W.*, John. 63; *Churchill* v. *C.*, 5 Eq. 44; *Roach* v. *Trood*, 3 Ch. D. 429; *King* v. *K.*, 15 Ir. Ch. R. 479; cf. *White* v. *W.*, 22 Ch. D. 555; *Pitman* v. *Crum Ewing*, [1911] A. C. 217.

(*m*) *King* v. *K.*, *supra*.

(*n*) *Blacket* v. *Lamb*, 14 B. 482; *Kampf* v. *Jones*, 2 Keen, 756; *Carver* v. *Bowles*, 2 Russ. & M. 301.

(*o*) *Newman* v. *N.*, 1 Bro. Ch. 186; *Chalmers* v. *Storil*, 2 V. & B. 222; *Whistler* v. *Webster*, 2 V. 367; *Douglas* v. *D.*, 12 Eq. 617; *Codrington* v. *C.*, L. R. 7 H. L. 868. As to the date at which compensation is to be ascertained, see *Re Hancock*, [1905] 1 Ch. 16; *Re Macartney*, [1918] 1 Ch., at p. 306.

(*p*) L. R. 6 Ch. 15.

(*q*) *Pusey* v. *Desbouverie*, 3 P. W. 315; *Boynton* v. *B.*, 1 Bro. Ch. 445; *Kidney* v. *Coussmaker*, 12 V. 136; *Dillon* v. *Parker*, 1 Swans. 381, and note.

(*r*) [1918] 1 Ch. 492.

in Paraguay for a charity. By the law of Paraguay this gift was valid only as to one-fifth, the other four-fifths going to the obligatory heirs, to whom the testatrix bequeathed benefits out of her English property. It was held that the principle adopted in *Re Oliver* (*s*), *Re Nash* (*t*), and *Re Virte* (*u*) does not apply to cases where the invalidity of a gift arises under foreign and not under English law. It was held, therefore, that the heir must elect. In his judgment in this case, Lord Younger (then Younger, J.) indicated that he considered that the three last-mentioned cases were wrongly decided, and that *Re Bradshaw* (*x*) ought not to have been overruled (*y*).

A person who does not elect within the time limited will be considered as having elected to take *against* the instrument putting him to his election (*z*).

(B) Implied.—Difficulty often arises in deciding what acts of acceptance or acquiescence amount to an implied election. There is generally an inquiry directed as to whom the premises (belonging to another), in the testator's will mentioned, belonged at his death, and if they belonged to A (a person to whom he had given by will benefits), whether A had elected in his lifetime to take under the testator's will (*a*). On a question of election by a party bound to elect between two properties, it is necessary to inquire into the circumstances of the property against which the election is supposed to have been made; for if a party so situated, not being called on to elect, continues in the receipt of the rents and profits of both properties, such receipt cannot be construed into an election to take the one and reject the other; and, in like manner, if one of the properties does not yield rent to be received, and the party liable to elect deals with it as his own—as, for instance, by mortgaging it (particularly if this be done with the knowledge and concurrence of the party entitled to call for an election)—such dealing will be unavailable to prove an actual election as against the receipt of the

(*s*) [1905] 1 Ch. 191.
(*t*) [1909] 2 Ch. 450; [1910] 1 Ch. 1.
(*u*) [1915] 1 Ch. 920.
(*x*) [1902] 1 Ch. 436.
(*y*) See also the comments on *Re Bradshaw* and *Re Oliver* in the introduction to Theobald on Wills, and in Jarman (6th ed.), 851. See also Gray on Perpetuities (3rd ed.), pp. 457—9.
(*z*) See the decree in *Streatfield* v. *S.*, 1 Swans. 447.
(*a*) *Peck* v. *P.*, Seton (7th ed.), p. 1527.

rent of the other property (*b*). Any acts, to be binding upon a person, must be done with a full knowledge of his rights (*c*); also with the knowledge of the right to elect (*d*), and with the intention of electing (*e*).

Although before an heir can be put to his election he is entitled to know everything which concerns the situation and the value of the property in reference to which he may be required to make his election, there is no authority for the proposition that where an heir has chosen deliberately to confirm a devise of lands, which, without his confirmation, would be invalid, there must be, in order to enable the Court to hold that those claiming under him are bound by his confirmation, some distinct evidence of his knowledge of his rights (*f*).

It is difficult to lay down any rule as to what length of time, after acts done by which election is usually implied, will make such implied election binding, and prevent a party setting up the plea of ignorance of his rights. In *Wake* v. *W.* (*g*), it was held that three years' receipt of a legacy and annuity, under a will by a widow in ignorance of her rights, did not preclude her from making her election; in *Reynard* v. *Spence* (*h*), where a widow had received an annuity for five years, it was held she had not elected (*i*). And in *Sopwith* v. *Maugham* (*k*), where a widow had for sixteen years enjoyed a provision under a will in ignorance of her right to dower, in express satisfaction of which the provision was made for her, she was held not to have elected.

But a person may by his unequivocal acts suffer specific enjoyment by others until it becomes inequitable to disturb it (*l*).

A sale of his own property, devised by the testator to others, will be considered an election to take against the will by a person

(*b*) *Padbury* v. *Clark*, 2 Mac. & G. 298; and see *Morgan* v. *M.*, 4 Ir. Ch. R. 606, 614; *Re Turner*, 66 L. T. 758.

(*c*) *Wilson* v. *Thornbury*, L. R. 10 Ch., at p. 248.

(*d*) *Chalmers* v. *Storil*, 2 V. & B. 222, 224; *Briscoe* v. *B.*, 7 Ir. Eq. R. 123; *Sweetman* v. *S.*, 2 Ir. R. Eq. 141.

(*e*) *Stratford* v. *Powell*, 1 Ball & B. 1; *Dillon* v. *Parker*, 1 Swans. 380, 387; *Edwards* v. *Morgan*, 1 Bli. (N.S.) 401; *Worthington* v. *Wiginton*, 20 B. 67.

(*f*) *Dewar* v. *Maitland*, 2 Eq., at p. 838.

(*g*) 1 V. 335.

(*h*) 4 B. 103.

(*i*) See also *Butricke* v. *Brodhurst*, 3 Bro. Ch. 90; *Dillon* v. *Parker*, 1 Swans. 386; *Fytche* v. *F.*, 7 Eq. 494.

(*k*) 30 B. 235.

(*l*) *Tibbits* v. *T.*, 19 V. 663; *Dewar* v. *Maitland*, 2 Eq. 834; and see as to election implied by acting on a contract and taking the benefit of it, *Greenhill* v. *North British, etc., Co.*, [1893] 3 Ch. 474.

taking a beneficial interest under the will (*m*), and election may be inferred from one (*n*) or a series of unequivocal acts (*o*). And acts of implied election which will bind a party will also bind his representatives (*p*). And some acts, which it appears would not be binding upon him if insisted upon in his lifetime, will bind his representatives "upon that principle only," as observed by Lord Hardwicke, "not to disturb things long acquiesced in families, upon the foot of rights which those, in whose place they stand, never called in question" (*q*). But if the representatives of those who were bound to elect, and who have accepted benefits under the instrument imposing the obligation of election, but without explicitly electing, can offer compensation, and place the other party in the same situation as if those benefits had not been accepted, they may renounce them and determine for themselves (*r*).

A person entitled in remainder to an interest in property is not bound by the election of a party having a prior interest (*s*), and every member of a class, moreover, as, for instance, next-of-kin, has a distinct right to elect, and will not be bound by the election of the majority nor of the administrator (*t*).

So where a defendant has elected to take estates appointed by the will of a testator, who has bequeathed to others the defendant's share of funds in settlement, the defendant will be directed to execute a proper release of his share and interest in the settlement to the trustees thereof, such release to be settled by the Judge (*u*).

6. Election by Parties under Disabilities.

Infants.—Where an infant is put to election, the period of election is, in some instances, as in *Streatfield* v. *S.*, deferred until

(*m*) *Rogers* v. *Jones*, 3 Ch. D. 688.

(*n*) *Barrow* v. *B.*, 4 K. & J. 409; *Greenhill* v. *North British, etc., Co.*, [1893] 3 Ch. 474.

(*o*) *Spread* v. *Morgan*, 11 H. L. C. 588; *Briscoe* v. *B.*, 1 Jo. & Lat. 334; *Giddings* v. *G.*, 3 Russ. 241.

(*p*) *Northumberland* v. *Aylesford*, Amb. 540, 657; *Dewar* v. *Maitland*, *supra*; *Stratford* v. *Powell*, 1 Ball & B. 1; *Ardesoife* v. *Bennett*, Dick. 463.

(*q*) *Tomkyns* v. *Ladbroke*, 2 Ves. Sen. 593; *Worthington* v. *Wiginton*, 20 B. 67; *Sopwith* v. *Maugham*, 30 B. 235, 239; *Whitley* v. *W.*, 31 B. 173.

(*r*) *Dillon* v. *Parker*, 1 Swans. 385; *Moore* v. *Butler*, 2 Sch. & L. 268; *Tysson* v. *Benyon*, 2 Bro. Ch. 5.

(*s*) *Ward* v. *Baugh*, 4 V. 623; *Hutchison* v. *Skelton*, 2 Macq. H. L. C. 492, 495.

(*t*) *Fytche* v. *F.*, 7 Eq. 494.

(*u*) *Fleming* v. *Buchanan*, Seton (7th ed.), 1528.

after he comes of age (*x*). In other cases there has been a reference to inquire what would be most beneficial to the infant (*y*). And where the Court had sufficient materials before it an order has been made for an infant to elect without a reference to Chambers (*z*).

Married Women.—The practice as to election by women married under the old law before 1883, in cases in which they were not restrained from anticipation, varied (*a*); but in general there would be an inquiry what was most beneficial, and election would be required to be made within a limited time (*b*); although where the married woman had manifestly the better interest, the inquiry might be dispensed with (*c*).

Lunatics, etc.—The right to elect to take under or against a will may, where a lunatic is so found, be exercised by his committee under the direction of the Court. Where not so found, as it cannot be exercised by himself, it may be by his representatives after his death (*d*).

7. Confirmation and Ratification of Contracts and Election.

The consequences resulting from the exercise of the common law right of confirming a voidable or unenforceable contract have an apparent resemblance under certain circumstances to the consequences resulting from election proper. In the former case, however, the person confirming makes his own imperfect disposition absolutely binding on himself, or, if he repudiates, frees himself from all liability thereunder; in the latter case he either gives effect to the act of another, or refusing to do so, a case for compensation arises. No case of election proper can arise save where a person is called upon to choose between a right vested in himself and a benefit conferred upon him by another. A certain amount of confusion has, however, been caused by the employment of phraseology appropriate to cases of election (*e*) in decisions where the sole question was whether by her acts after marriage a married woman

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(*x*) *Boughton* v. *B.*, 2 Ves. Sen. 12; *Bor* v. *B.*, 3 Bro. P. C. 173, Toml. edit.

(*y*) *Gretton* v. *Haward*, 1 Swans. 413; *Brown* v. *B.*, 2 Eq. 481; *Seton* v. *Smith*, 11 Si. 59.

(*z*) *Blunt* v. *Lack*, 26 L. J. Ch. 148; *Lamb* v. *L.*, 5 W. R. 772.

(*a*) See Mr. Swanston's note to *Gretton* v. *Haward*, 1 Swans. 413; *Re Jones*, [1893] 2 Ch. 461.

(*b*) *Cooper* v. *C.*, L. R. 7 H. L. 53, 67, 79.

(*c*) *Wilson* v. *Townshend*, 2 V. 693; *Hamilton* v. *H.*, [1892] 1 Ch., at p. 408.

(*d*) *Re Hewson*, 23 L. J. Ch. 256.

(*e*) *Harle* v. *Jarman*, [1895] 2 Ch., at p. 427.

had confirmed an ante-nuptial settlement of her own property made by her whilst an infant.

There has never been any doubt but that a settlement made by an infant was merely voidable and not void : it could be confirmed after majority, and if not repudiated within a reasonable time it became binding (*f*). Before the Married Women's Property Act, 1882, there were certain apparent difficulties in applying the general principle to ante-nuptial settlements by married women. A married woman under the old law could neither convey her freeholds nor assign her reversionary choses in action except when empowered by statute, and then only by deed acknowledged, nor contract save in regard to separate estate existing at the date of the contract (*g*). It was nevertheless established that her ante-nuptial settlement made during her infancy could be confirmed by her when of age, though then married, and so bind freeholds and reversionary choses in action included in the settlement (*h*). It was also held that such a settlement unless repudiated within a reasonable time after majority became binding (*i*).

The general principle has no application to a *void* contract; and accordingly a post-nuptial settlement made by a woman married under the law before 1883 (and not under the provisions of Malins' Act) being void, the same was incapable of being confirmed (*k*).

8. Death of Person to Elect without Electing.

If a person under an obligation to elect dies without having done so, and property which he takes beneficially under the will, and his own property bequeathed to strangers, go the same way; if, for instance, both be personal property vesting either in his legatees or, in the case of intestacy, in his next-of-kin; such legatees or next-of-kin would be entitled to elect (*l*). Those of the next-of-kin

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(*f*) *Davies* v. *D.*, 9 Eq. 468. The rule is unaffected by the Infants' Relief Act, 1874 : *Duncan* v. *Dixon*, 44 Ch. D. 211; *Edwards* v. *Carter*, [1893] A. C. 360, reported in C. A., *Carter* v. *Silber*, [1892] 2 Ch. 278. Cf. *Cooper* v. *C.*, 13 A. C. 88; *Re Jones*, [1893] 2 Ch. 461.

(*g*) Fines and Recoveries Act, 1883, ss. 77 *et seq.*; Malins' Act, 20 & 21 Vict. c. 57 (now replaced by the L. P. Act, 1925, s. 167). See *infra*, notes to *Hulme* v. *Tenant*.

(*h*) *Barrow* v. *B.*, 4 K. & J. 409; *Wilder* v. *Pigott*, 22 Ch. D. 263; *Greenhill* v. *North British Insurance Co.*, [1893] 3 Ch. 474; *Re Hodson*, [1894] 2 Ch. 421.

(*i*) *Burnaby* v. *Equitable Reversionary Int. Soc.*, 28 Ch. D. 416; *Re Hodson*, [1894] 2 Ch., at p. 425; and see *Edwards* v. *Carter*, *supra*.

(*k*) *Seaton* v. *S.*, 13 A. C. 61; and see *Harle* v. *Jarman*, [1895] 2 Ch. 419.

(*l*) *Fytche* v. *F.*, 7 Eq. 494; and see *Re Hewson*, 23 L. J. Ch. 256; *Cooper* v. *C.*, L. R. 7 H. L. 53; *Vanneck* v. *Benham*, [1917] 1 Ch. 60, 76.

who elect to take under the will, will be entitled to all the beneficial interest by the will conferred on the intestate; and any of them electing to take against the will must not only give up all benefits under it, but are bound to bring into account the interest of the person through whom they claim (*m*).

As to election in cases of conversion, see *Fletcher* v. *Ashburner*, *ante*.

(*m*) *Fytche* v. *F.*, 7 Eq. 494; following *Ward* v. *Baugh*, 4 V. 623.

EQUITABLE ESTOPPEL.

SAVAGE *v.* FOSTER.

Trinity Term, 9 Geo. 1. In Chancery.
[Reported, 9 Modern Reports, 35.]

Where a person knowing his own title, and not giving notice of it to a purchaser, shall never set it up against the purchaser.

Margaret Smith, being seised of the lands in question, upon her marriage with Peter Flavill settled the same upon trustees and their heirs, to the use of the said Peter Flavill for life, then upon Margaret his intended wife for life; remainder after the death of the said Peter and Margaret, to the heirs of the said Peter on the body of the said Margaret to be begotten; remainder to the right heirs of the said Margaret for ever.

The said Peter and Margaret had issue only one daughter, the now defendant, who was married to one Foster.

Peter Flavill died, and then his widow married one Brown, by whom she had issue one other daughter, and no more; which daughter being courted by one Williams, but he refusing to marry her without such a fortune which Margaret her mother was not able to give without breaking through this settlement, Margaret conveyed the said lands to the aforesaid Williams, etc.; and the defendant Mrs. Foster, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother, Margaret Brown, to make a conveyance in favour of the said Williams, and were assisting in carrying on the marriage between him and her half-sister Brown.

Whereupon the said Margaret conveyed these lands, etc., to the use of herself for life, remainder to Williams and his heirs; then the marriage took effect; and afterwards Williams sold these lands to the plaintiff Savage, who entered and built a house thereon.

Savage v. Foster.

And now Mrs. Foster, who was the issue in tail by virtue of the said settlement, and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert*, but that she should be concluded by this fact as well as if she were an infant.

It was argued for the defendant Mrs. Foster.—That two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this Court on the foot of fraud. It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with Williams, but did not know upon what terms; but if she had known the terms of that marriage, she was then a *feme covert*, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

On the other side it was first denied, that the two things before-mentioned by the plaintiff's (*quære* defendant's) counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying

on the agreement in order to a purchase; for if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself, by giving the purchaser notice of such right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favour of Williams, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

The Court.—Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this Court will establish it on the foot of fraud in the lessor, notwithstanding the Statute of Frauds, etc.; because contracts executed in part are not always within the statute, though executory contracts are (*a*).

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser.

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser, and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser

(*a*) *Lester* v. *Foxcroft*, Vol. II.

notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary, that such infant or *feme covert* should be active in promoting the purchase, if it appears that they were so privy to it that it could not be done without their knowledge.

THEREFORE IT WAS DECREED, that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he (*quære*, she) shall pay costs.

And the case of *Watts* v. *Cresswell* (*b*) was now remembered, where tenant for life borrowed money, and his son, who was next in remainder, and an infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title.

So in the case of one Clare (*c*), who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud.

NOTA.—In the next sessions of Parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition; but it was rejected for not coming in time.

NOTES.

1. Generally.
2. Cases illustrating the doctrine of Equitable Estoppel, p. 404.
3. Infancy and Coverture, p. 416.

1. Generally.

"Estoppel is not a cause of action—it is a rule of evidence which precludes a person from denying the truth of some statement pre-

(*b*) 9 Vin. Ab. 415; 2 Eq. Ca. Ab. 515.
(*c*) *Clare* v. *Earl of Bedford*, 13 Vin. Ab. 536, 537.

viously made by himself" (*d*). "An estoppel," said Bramwell, L.J., in *Simm* v. *Anglo-American Tel. Co.* (*e*), "may be said to exist where a person is compelled to admit that to be true which is not true, and to act upon a theory which is contrary to the truth."

Estoppel may assist a plaintiff or a defendant. "It shall be as you represented it to be. No man shall set up his own iniquity as a defence any more than as a cause of action" (*f*).

The rule is : Where a person by words or conduct causes another reasonably to believe the existence of a certain state of things and that it was meant he should act on that belief, and thereby induces him so to act upon it as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time (*g*).

The doctrine of estoppel by representation is a very old head of equity and is founded upon a broad principle which enters so deeply into the ordinary dealings and conduct of mankind that it has been doubted whether any great advantage is to be gained by endeavouring to reduce it to rules, such as those formulated in *Carr* v. *L. & N. W. Ry.* (*h*).

Kay, L.J., in *Low* v. *Bouverie* (*i*), states the result of the authorities thus :—

1. There has been from ancient times a jurisdiction in Courts of equity in certain cases to enforce a personal demand against one who has made an untrue representation upon which the person to whom it was made intended to act, if such person did act upon the faith of it and suffered loss by so acting (*k*).

2. This was readily done where the representation was fraudulently made, in which case an action for deceit would lie at law.

3. Relief will also be given at law and in equity even though the representation was innocently made without fraud in all cases where the suit will be effective if the defendant is estopped from denying the truth of the representation.

(*d*) *Per* Lindley, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch., at p. 101; and see *Fry* v. *Smellie*, [1912] 3 K. B. 282, 295. (*e*) 5 Q. B. D., at p. 202.

(*f*) *Per* Lord Mansfield in *Montefiori* v. *M.*, 1 W. Bl. 363.

(*g*) *Pickard* v. *Sears*, 6 Ad. & E., at p. 474, as explained in *Freeman* v. *Cooke*, 2 Exch., at p. 663. See also *Citizens' Bank of Louisiana* v. *First National Bank, etc.*, L. R. 6 H. L., at p. 361; *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 316; Pollock on Contracts (9th ed.), pp. 567, 568.

(*h*) L. R. 10 C. P. 316. See *per* Lord Macnaghten in *Whitechurch* v. *Cavanagh*, [1902] A. C., at p. 130; *Fry* v. *Smellie*, [1912] 3 K. B. 295.

(*i*) [1891] 3 Ch., at p. 111.

(*k*) See *Freeman* v. *Cooke*, 2 Exch. 654; *Pickard* v. *Sears*, 6 Ad. & E. 469; *Colonial Bank* v. *Cady*, 15 A. C. 267; *Farquharson* v. *King*, [1902] A. C. 325.

4. Where there is no estoppel an innocent misrepresentation will not support an action at law for damages occasioned thereby (*l*).

5. Estoppel is effective where an action must succeed or fail if the defendant or plaintiff is prevented from proving a particular fact alleged. But the rule does not apply to an action of deceit, for there the plaintiff relies, not on the truth of the statement, but upon its falsehood, and he is bound to prove not only that the representation was untrue, but also that it was fraudulent (*m*).

A representation constitutes a cause of action in itself only when it is fraudulent or amounts to a contract or warranty (*n*). Frequently the line between Fraud, Warranty, and Estoppel is difficult to draw; and in suits of equity, where the Judge had not, as in actions at law, the assistance of the jury in finding the facts, it is often difficult to determine the exact principle on which the decision was based, and many of the reported cases on estoppel are "uncommonly near contract" (*o*).

From the language used in some of these cases the idea arose that there was a doctrine in equity that a person who made a representation which turned out to be untrue could, even in the absence of fraud, be compelled to make it good (*p*), but it is now clear that no such doctrine exists (*q*).

Estoppel is distinguished from an Admission by the fact that a party is not conclusively bound by the latter. He may retract it or explain it away (*r*).

The cases establish the following proposition : that if A desires to avail himself of the doctrine of estoppel against B, he must show that B, no matter whether fraudulently or innocently, made (*s*) a representation of a *fact* (*t*) which was not true, or not true as

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(*l*) *Derry* v. *Peek*, 14 A. C. 337.

(*m*) *Scarf* v. *Jardine*, 7 A. C., at p. 350; *Derry* v. *Peek*, 14 A. C. 337.

(*n*) *Derry* v. *Peek*, 14 A. C. 337; *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Swan* v. *N. B. Australasian Co.*, 2 H. & C. 175; *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307; *Burkinshaw* v. *Nicolls*, 3 A. C. 1004; *Re Bahia, etc., Ry. Co.*, L. R. 3 Q. B. 584; *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396.

(*o*) *Brownlie* v. *Campbell*, 5 A. C., at p. 953.

(*p*) *Hammersley* v. *De Beil*, 12 Cl. & Fin. 45; *Slim* v. *Croucher*, 1 De G. F. & J. 518.

(*q*) *Derry* v. *Peek*, 14 A. C. 337; *Low* v. *Bouverie*, [1891] 3 Ch. 82; Pollock on Contracts (9th ed.), App., note I, p. 757.

(*r*) *Graves* v. *Key*, 3 B. & Ad., at p. 318; *Heane* v. *Rogers*, 9 B. & C. 577; cf. *Re Holland*, [1902] 2 Ch., at pp. 379, 380.

(*s*) *Hobbs* v. *Norton*, 1 Vern. 136; *Hunsden* v. *Cheyney*, 2 Vern. 149; *Burrowes* v. *Lock*, 10 V. 470; *Low* v. *Bouverie*, [1891] 3 Ch., at p. 109; *Weiner* v. *Gill*, [1905] 2 K. B. 172, 181; *Farquharson* v. *King*, [1902] A. C. 325.

(*t*) *Jorden* v. *Money*, 5 H. L. C. 185, followed in *Chadwick* v. *Manning*,

intended to be understood (*u*); that A was unaware of the untruth of such representation, and did not wilfully abstain from investigating its truth (*x*); and that he reasonably, in consequence of such representation (*y*), acted or refrained from acting, and was thereby prejudiced (*z*).

If the representation was fraudulent, its ambiguity would not be a defence; but in the absence of fraud, it must be proved to be clear and certain, and such as to mislead any reasonable man (*a*).

In the absence of a duty to disclose, mere silence will not give rise to an estoppel (*b*). The duty may come from the fiduciary relations of the parties, or from contract (*c*), or even from the conduct of the parties, as, for instance, in the principal case there would have been no duty on the plaintiff to disclose her title but for her acts in encouraging and assisting the marriage. Her silence thereby became equivalent to a representation that she had no material facts to disclose (*e*).

The principle on which conduct of this kind, or that known as "holding out," "lying by," or "acquiescence" (*f*), may work an estoppel is: "If a person having a right, and seeing another person about to commit, or in the course of committing, an act infringing on that right, stands by in such a manner as really to induce the person committing the act, and who might have otherwise abstained

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[1896] A. C. 231; *Maddison* v. *Alderson*, 8 A. C. 473; *Re Moore*, [1899] 1 Ch. 627; *Re Wickham*, 34 T. L. R. 158.

(*u*) *Piggott* v. *Stratton*, 1 De G. F. & J. 33.

(*x*) *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9, and *Re Building Estates Co., Parbury's Case*, [1896] 1 Ch. 100.

(*y*) *Freeman* v. *Cooke*, 2 Exch. 654; *Farquharson* v. *King*, [1902] A. C. 325; *Bell* v. *Marsh*, [1903] 1 Ch. 528; *Longman* v. *Bath Electric Tramway Co.*, [1905] 1 Ch. 646; *Lancs & Yorks Ry. Co.* v. *MacNicoll*, 88 L. J. K. B. 601; *Mac Fisheries, Ltd.* v. *Harrison*, 93 L. J. K. B. 811.

(*z*) *Re Wickham*, 34 T. L. R. 158; *Holt* v. *Markham*, [1923] 1 K. B. 504; *Mac Fisheries, Ltd.* v. *Harrison*, 93 L. J. K. B. 811.

(*a*) *Freeman* v. *Cooke*, 2 Exch. 654; *per* Kay, L.J., in *Low* v. *Bouverie*, [1891] 3 Ch. 109. Cf. *Right* v. *Bucknell*, 2 B. & Ad. 278; *Heath* v. *Crealock*, L. R. 10 Ch. 22; *General Finance, etc., Co.* v. *Liberator B. Society*, 10 Ch. D. 15; *Pierson* v. *Altrincham*, 86 L. J. K. B. 969; *Doey* v. *L. & N. W. Ry.*, [1919] 1 K. B. 623.

(*b*) Moncrieff on Fraud (1891), pp. 90, 328; *Osborn* v. *Lea*, 9 Mod. 96; *Brownlie* v. *Campbell*, 5 A. C. 954; *Peek* v. *Gurney*, L. R. 6 H. L. 377 (distinguished in *Andrews* v. *Mockford*, [1896] 1 Q. B. 372); *Ogilvie* v. *West Australian, etc., Corporation*, [1896] A. C. 257.

(*c*) See *Pearl Mill Co., Ltd.* v. *Ivy Tannery Co., Ltd.*, [1919] 1 K. B. 78.

(*e*) See also *Burrowes* v. *Lock*, 10 V. 470; *Low* v. *Bouverie*, [1891] 3 Ch. 82; Moncrieff on Fraud (1891), p. 328.

(*f*) See *per* Fry, J., *Willmott* v. *Barber*, 15 Ch. D. 96, *post*, p. 409.

from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act" (*g*).

Estoppel will not aid a mere volunteer (*h*).

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation or by his concealment of a material fact, the disclosure of which would have been calculated to make his informant hesitate before making the statement, or where the circumstances would have deterred a reasonable man from acting on such statement (*i*). So, too, a misrepresentation which does not deceive cannot be relied on as an estoppel (*k*).

Where a misrepresentation is fraudulent, damages may be recovered in an action for deceit. "Where a man makes a statement, to be acted on by others, which is false, and which is known by him to be false, or is made by him recklessly without care whether it is true or false, he is liable to an action of deceit at the suit of anyone to whom it was addressed (*l*), and who was materially induced by the misstatement to do an act to his prejudice" (*m*). And where a false statement is deliberately made by A to B's agent that it may be communicated to, and acted upon by B, who is unaware of its falsehood, the knowledge of B's agent that the statement was false cannot be imputed to B (*n*).

In contract, too, if there be a false representation of a material fact made by one of the parties or his agent, whereby the other is deceived, then, however, honestly the representation may have been made, and however free from blame the person who made it (*o*), the party deceived may claim rescission of the contract, or, if the statement amount to a warranty, he may sue upon it (*p*).

(*g*) *De Bussche* v. *Alt*, 8 Ch. D., at p. 314; *Teasdale* v. *T.*, Sel. Ch. Ca. 170; *Jackson* v. *Cator*, 5 V. 688; *Dann* v. *Spurrier*, 7 V. 231; *McManus* v. *Cooke*, 35 Ch. D., at p. 695; *Allcard* v. *Skinner*, 36 Ch. D., at p. 192; *Bell* v. *Marsh*, [1903] 1 Ch. 528; *Re Lewis*, [1904] 2 Ch. 656; cf. *Att.-Gen.* v. *Collom*, [1916] 2 K. B. 193: *Millard* v. *Humphreys*, 92 L. J. P. C. 161.

(*h*) *Lovett* v. *L.*, [1898] 1 Ch. 82, 88.

(*i*) *Porter* v. *Moore*, [1904] 2 Ch. 367; *Whitechurch* v. *Cavanagh*, [1902] A. C., at p. 145; *Low* v. *Bouverie*, [1891] 3 Ch., at p. 113.

(*k*) *Nelson* v. *Stocker*, 4 De G. & J. 458; and cf. *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9.

(*l*) *Peek* v. *Gurney*, L. R. 6 H. L. 390; *Angus* v. *Clifford*, [1891] 2 Ch. 449; *Le Lievre* v. *Gould*, [1893] 1 Q. B. 491; *Andrews* v. *Mockford*, [1896] 1 Q. B. 372.

(*m*) *Derry* v. *Peek*, 14 A. C., at p. 374.

(*n*) *Wells* v. *Smith*, [1914] 3 K. B. 722.

(*o*) *Derry* v. *Peek*, 14 A. C., at p. 359; *Redgrave* v. *Hurd*, 20 Ch. D. 12; *Aaron's Reefs* v. *Twiss*, [1896] A. C. 273.

(*p*) *Starkey* v. *Bank of England*, [1903] A. C. 114; *Barclay* v. *Sheffield Corporation*, [1905], A. C. 392; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208.

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It is a rule that an estoppel against an estoppel sets the matter at large (*q*).

2. Cases illustrating the Doctrine of Equitable Estoppel.

The representation must be of a matter of fact, and must not be a mere expression of intention. In *Jorden* v. *Money* (*r*), a lady to whom a gentleman owed a debt on a bond had on several occasions announced her intention of abandoning her claim, and especially at the time when he was about to marry. After his marriage she sued on the bond. It was urged that, upon the doctrine of representation, she was not at liberty afterwards to enforce her claim. The House of Lords held (Lord St. Leonards dissenting) that she was not estopped, on the ground that the doctrine does not apply to a statement of a party's intention. "I have always understood it to have been decided in *Jorden* v. *Money*," said Lord Selborne in *Maddison* v. *Alderson* (*s*), "that the doctrine of estoppel by representation is applicable only to some state of facts alleged to be at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts" (*t*).

As against his landlord a tenant is estopped from denying the former's title, unless he has been ejected by title paramount (*u*). But this rule does not apply to strangers, who may accordingly dispute the landlord's title (*x*). Mere payment of money as rent under the erroneous belief that there was a tenancy does not estop the person paying from showing there was no tenancy (*y*).

In *Grosvenor Hotel Co.* v. *Hamilton* (*z*) the lessor sued for rent, and the lessee counter-claimed for a nuisance from vibration of machinery worked by the lessor on adjoining land. The lessor proposed to show that a house of ordinary stability would not have been affected, but, it being shown that he let it in its then

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(*q*) See note to *Duchess of Kingston's Case*, 2 Sm. L. C. Consider, however, the observations of Parker, J., upon this doctrine in *Poulton* v. *Adjustable, etc., Co.*, [1908] 2 Ch. 430.

(*r*) 5 H. L. C. 185; *Chadwick* v. *Manning*, [1896] A. C. 231.

(*s*) 8 A. C., at p. 473; *Citizens' Bank of Louisiana* v. *First National Bank*, L. R. 6 H. L. 352; *Re a Bankruptcy Notice*, [1924] 2 Ch. 76, 89.

(*t*) Cf. *Whitechurch* v. *Cavanagh*, [1902] A. C. 117, 130; *Cresswell* v. *Jeffreys*, 29 T. L. R. 90.

(*u*) *Cuthbertson* v. *Irving*, 4 H. & N. 742.

(*x*) *Tadman* v. *Henman*, [1893] 2 Q. B. 168: Woodfall (21st ed.), p. 556.

(*y*) *Batten Pool* v. *Kennedy*, [1907] 1 Ch. 256, 268.

(*z*) [1894] 2 Q. B. 836; and see *Markham* v. *Paget*, [1908] 1 Ch. 697.

condition, it was held, upon the principle that a man cannot derogate from his own grant, that the lessor could not rely upon the fact that the house was not of ordinary stability.

In *Piggott* v. *Stratton* (*a*) the defendant, a lessee, induced the plaintiff to take an underlease of land for building purposes by stating he held the adjoining land under the same head lease, and could not, owing to its terms, build upon it so as to obstruct the sea view from the land he was sub-letting. The plaintiff built a house on the land, and then the defendant surrendered his lease, and took a new one which omitted the restrictions, and then commenced building in such a way as to obstruct the view from plaintiff's house. The Court held that defendant must be restrained on the ground of estoppel. What the defendant had said was "nothing more than representation accurate in itself of an existing fact. But it was intended to be understood, and was in fact understood, as an assurance that he had no power to obstruct the sea view during the lease, and that the underlessee would be safe from the apprehended obstruction" (*b*).

In *Ramsden* v. *Dyson* (*c*) Lord Cranworth said: "If a stranger begins to build on my land, supposing it to be his own, and I, perceiving his mistake, abstain from setting his right and leave him to persevere in his error, a Court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own" (*d*).

Unless a recital be clear and unambiguous, no estoppel can be based on it. Where, therefore, a conveyance recited that a person was legally or equitably entitled, and in fact he had only an equitable title, he was not estopped from dealing with the legal title which he subsequently acquired (*e*). Nor in a mortgage deed do the covenants for title, whether read in connection with the word "grant" or not, amount to that precise averment that the mortgagor is seised of the legal estate which is necessary to create an estoppel (*f*). And where a recital was inaccurate only by reason of omissions no estoppel was allowed (*g*). Lord Holt in *Salter* v.

(*a*) 1 De G. F. & J. 33.

(*b*) *Per* Lord Macnaghten in *Spicer* v. *Martin*, 14 A. C., at p. 23.

(*c*) L. R. 1 H. L., at p. 140.

(*d*) See also *Canterbury* v. *Cooper*, 99 L. T. 612; *Keith* v. *Gancia*, [1904] 1 Ch. 774; *Jones Brothers (Holloway), Ltd.* v. *Woodhouse*, [1923] 2 K. B. 117.

(*e*) *Right* v. *Bucknell*, 2 B. & Ad. 278; *Heath* v. *Crealock*, L. R. 10 Ch. 22; cf. *Clark* v. *Hall*, 24 L. R. Ir. 316; Everest & Strode (3rd ed.), p. 180.

(*f*) *General Finance, etc., Co.* v. *Liberator Building Society*, 10 Ch. D. 15; cf. *Powell* v. *Browne*, 97 L. T. 854.

(*g*) *Lovett* v. *L.*, [1898] 1 Ch. 82.

Kidley (*h*) has laid it down that a general recital is not an estoppel. A recital cannot make a transaction legal which is in fact *ultra vires* (*i*).

In *The Onward Building Society* v. *Smithson* (*k*) the defendants, who were trustees with a power of sale, in 1875 sold lands to T. In 1876 T. executed a legal mortgage to B. In 1877 T. fraudulently procured from the defendants a second conveyance for value of the same property upon the representation that it had not been sold. The conveyance recited the seisin of their testator at his death, the devise to the defendants upon trust, the power of sale and the agreement to sell free from incumbrances, and the defendants covenanted that they had not encumbered and that they had good right to convey. T. then mortgaged the premises to the plaintiffs under the false title. T. having absconded, and the plaintiffs' security proving insufficient owing to the mortgage to B., they sued the defendants on their covenants for title with T. The Court of Appeal held that, apart from estoppel, the plaintiffs, as assignees of the equity of redemption, had no *locus standi* to sue the defendants, and that the recitals were not sufficiently precise to estop the defendants from denying that at the date of the conveyance they were the owners of the legal estate. It would seem that even if there had been an estoppel the action must have failed, as the plaintiffs would have had no better right than their assignor. The deed nowhere expressly stated that at the date of the conveyance the defendants had an estate in fee in the land which they could convey free from incumbrances, though the recitals led to that *inference*. Estoppel, however, cannot rest on mere inference (*l*).

If a person represents himself as a partner, or knowingly suffers himself to be represented as a partner, he will be liable as such to any person who has given credit to the firm on the faith thereof (*m*). The question most frequently arises when a partner retires. A notice in the *Gazette* is a sufficient notice to future customers of the firm, but existing customers require actual notice (*n*). They then have the option to claim against the old firm, or accept the liability of the new. But if, after notice, they go on dealing with the new

(*h*) 1 Show. 56.

(*i*) *Re Eddystone Marine Insurance Co.*, [1893] 3 Ch. 9; Everest and Strode (3rd ed.), p. 185.

(*k*) [1893] 1 Ch. 1.

(*l*) See *per* Lindley, L.J., at pp. 13, 14.

(*m*) Partnership Act, 1890, s. 14; *Re Fraser*, [1892] 2 Q. B. 633.

(*n*) Partnership Act, 1890, ss. 36, 37.

firm, they will be deemed to have elected to accept the liability of the new firm (*o*). But until existing customers have actual notice, a retiring partner may be made liable, although he has ceased to have any interest in the firm (*p*).

There is in general no active duty to give information (*q*), or to take precaution against fraud (*r*). Where an executor wrote to inform a beneficiary that he was entitled to certain property under the testator's will, but did not inform him of the exact conditions, it was held that he was not estopped, as he was under no duty to give exact information, and that which he had given was inaccurate only by omission (*s*). And where a bill for £500 was presented for acceptance with a stamp of much larger amount than was necessary and with spaces left, and after acceptance the drawer fraudulently turned the bill into one for £3,500, it was held that the acceptor was under no liability to a *bona fide* holder for value beyond the sum for which he had accepted (*t*).

Where the owner of a chattel parts with the possession of it, he will not, by that alone, be estopped from setting up his title (*u*).

A duty to give information may arise from the circumstances. If a person mixes in a transaction in such a way that his silence will cause a wrong belief in the facts, then it is his duty to disclose them. The leading case is an illustration. Thus where the absolute owner of a term is present when her son declares he is entitled to it on her death, and witnesses the deed whereby he settles his interest, she will be held estopped from denying her son's title (*y*). And in *Neville* v. *Wilkinson* (*z*), on the treaty for the marriage of N., W. drew up a statement of N.'s debts in order that the bride's father might know his position. He omitted a debt due to himself, and the marriage took place on the faith of that statement. W. afterwards sued for his debt. Lord Thurlow restrained him on the ground that the omission amounted to a representation that nothing was due to him.

(*o*) *Scarf* v. *Jardine*, 7 A. C. 345, 350.
(*p*) *Freeman* v. *Cooke*, 2 Ex. 664.
(*q*) *Osborn* v. *Lea*, 9 Mod. 96; *Re Lewis*, [1904] 2 Ch. 656.
(*r*) *Scholfield* v. *Londesborough*, [1896] A. C. 514; *Evans* v. *Bicknell*, 6 V. 174.
(*s*) *Re Lewis*, [1904] 2 Ch. 656.
(*t*) *Scholfield* v. *Londesborough*, *supra*.
(*u*) *Weiner* v. *Gill*, [1905] 2 K. B. 172; *London J. S. Bank* v. *Simmons*, [1892] A. C., at p. 215. See section 21, sub-section 1 of the Sale of Goods Act, 1893.
(*y*) *Hunsden* v. *Cheyney*, 2 Vern. 150; cf. *Hobbs* v. *Norton*, 1 Vern. 136.
(*z*) 1 Bro. C. C. 543.

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A person giving information is bound to give it accurately, but, in the absence of a statement that it is complete, will not be liable for omissions (*a*).

This is the distinction between *Burrowes* v. *Lock* (*b*) and *Low* v. *Bouverie* (*c*), for, in the former case, the trustee stated, in effect, that the *cestui que trust* was then absolutely entitled, while, in the latter, he simply mentioned such incumbrances as occurred to him, but *did not say there were no others.*

Burrowes v. *Lock* may perhaps be also supported on the ground of fraud (*d*) or possibly warranty (*e*). The facts were as follows :—

E. C., being entitled to a share in a residuary trust fund, in 1790 entered into a deed of family arrangement under which one-tenth of his share was to be paid to J. C. In 1801 E. C. negotiated the sale of his share to the plaintiff B., and in answer to an inquiry by the intending assignee, J. L. the trustee of the estate wrote, "Wm. Edward Cartwright [E. C.] is entitled to his share of money secured by debentures on Lord Dillon's estate, when sold to pay them off, which he can dispose of to any one." J. L. had had notice of the deed of 1790, but did not inform the intending assignee thereof, and the latter accordingly took an assignment of the share by a deed of November 21, 1801, and gave notice thereof to J. L. On November 20, 1802, the fund was paid to J. L., who retained E. C.'s share, and on the plaintiff applying to J. L. for payment J. C. set up his claim under the deed of 1790. The Court decreed in effect that J. L. should pay the whole sum to B.

In *Low* v. *Bouverie* (*f*) a person, being entitled under a settlement to a life interest in certain funds, applied to the plaintiff for a loan on the security of such interest. The plaintiff's solicitors thereupon wrote to the defendant Bouverie, who was one of the trustees of the settlement, asking what the trust fund consisted of, and whether the proposed borrower was still entitled to the full benefit of his life interest in such fund. The defendant replied stating that the life interest was subject to certain charges, specifically mentioning them, but did not say there were no others.

(*a*) *Burrowes* v. *Lock*, 10 V. 470; *Low* v. *Bouverie*, [1891] 3 Ch. 82; *Re Lewis*, [1904] 2 Ch. 656; and see *Everett* v. *Griffiths*, [1920] 3 K. B., at p. 195.

(*b*) 10 V. 470; *Low* v. *Bouverie*, [1891] 3 Ch., at p. 94 (n.).

(*c*) [1891] 3 Ch. 82.

(*d*) *Low* v. *Bouverie*, *supra*, at p. 102.

(*e*) *Brownlie* v. *Campbell*, 5 A. C., at p. 953.

(*f*) [1891] 3 Ch. 82.

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The advance was made on the security of a mortgage of the borrower's life interest. Subsequently, the plaintiff discovered that the life interest was subject to several incumbrances prior to his own, but which the defendant, although he had received notice, had forgotten to mention to the plaintiff. The plaintiff's security being insufficient, he sued the defendant to have him declared liable to pay the amount due on the mortgage. On appeal, the Court of Appeal held that there was no breach of duty, as defendant was under no obligation to do more than answer such inquiries honestly (fraud was not alleged); that there was no warranty, as the plaintiff and defendant were not contracting parties; that there was no estoppel, because in order to create an estoppel the representation must be clear and unambiguous, and the defendant had not said that there were no incumbrances except those mentioned; and also that to create an estoppel, the person to whom it is made must be misled by it, and of this there was no evidence, or not sufficient evidence to satisfy the Court (*g*).

If a person, having an incumbrance on an estate, deny the fact on an inquiry by an intending purchaser, equity will relieve against the incumbrance (*h*).

The principles on which Acquiescence will estop the owner of a right from asserting it were laid down by Fry, J., in *Willmott* v. *Barber* (*i*). "A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place, the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money, or must have done some act (not necessarily on the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right, which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with

(*g*) See judgment of Kay, L.J., [1891] 3 Ch., at pp. 113, 114.

(*h*) *Ibbotson* v. *Rhodes*, 2 Vern. 554; *Amy's Case*, cited 2 Ch. Ca. 128; *Hickson* v. *Aylward*, 3 Mol. 1; *Berrisford* v. *Milward*, 2 Atk. 49; cf. *Stronge* v. *Hawkes*, 4 De G. M. & G. 186; *Boyd* v. *Belton*, 1 Jo. & Lat. 730.

(*i*) 15 Ch. D. 96, reversed on a question of costs only, 17 Ch. D. 772; see *Dann* v. *Spurrier*, 7 V. 231, and the cases *ante*, pp. 402-3.

knowledge of your legal rights (*k*). Fourthly, the defendant must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant must have encouraged the plaintiff in his expenditure of money, or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal title from exercising it, but, in my judgment, nothing short of this will do" (*l*).

Where the servant or agent of a person has abused his position, but has acted within the apparent scope of his authority, his principal may be estopped from relying upon the limits placed on such authority (*m*).

In *Rimmer* v. *Webster* (*n*) the estoppel was based on the principle that where an owner has not only transferred property to an agent or trustee, but has acknowledged that the transferee has paid full consideration for it, he cannot set up his equitable title against a person to whom the transferee has disposed of the property for value, for he voluntarily arms the transferee with the means of dealing with the estate as the absolute, legal and equitable owner free from every shadow of incumbrances or adverse equity.

In *Farquharson* v. *King* (*o*) the appellants' clerk had a limited authority to sell to known customers, and the dock company, with whom they stored timber, was instructed to accept the delivery orders he signed. The clerk fraudulently signed transfer orders to himself in an assumed name, and in that name gave delivery orders to the respondents, who knew nothing of the appellants or of the clerk in his own name. The jury found that the appellants did not so act as to hold the clerk out as their agent to sell goods to the respondents, and the House of Lords accordingly held that the appellants were not estopped from setting up their own title.

In *Whitechurch* v. *Cavanagh* (*p*) it was held that, in permitting its secretary to certify transfers of shares, a company does not thereby authorise him to do more than give a receipt for shares actually lodged, and, consequently, is not estopped from setting up

(*k*) *Hoare* v. *Kingsbury U. C.*, [1912] 2 Ch. 452, 465.

(*l*) And see *Procter* v. *Bennis*, 36 Ch. D. 740, 761.

(*m*) *Bailey & Whites, Ltd.* v. *House*, 31 T. L. R. 583; *Soanes* v. *L. & S. W. Ry.*, 88 L. J. K. B. 524.

(*n*) [1902] 2 Ch. 163; *Burgis* v. *Constantine*, [1908] 2 K. B. 484.

(*o*) [1902] A. C. 325.

(*p*) [1902] A. C. 117.

the truth in an action based on the fact that the secretary had given a receipt or acknowledgment for shares which had not actually been lodged (*q*).

In *Fry* v. *Smellie* (*r*) the plaintiffs, being registered holders of 500 shares in an oil company, handed to T certain documents relating to such shares with a blank transfer signed by them, for the purpose of T procuring a loan of £250, *and no less sum*, upon the security of such shares. T handed the documents and transfer to S, who advanced £100 upon the security of the same. Held that although T had departed from his instructions, S was entitled to hold the documents until his loan was repaid. In *Lloyd* v. *Grace, Smith & Co.* (*s*) a widow who owned two cottages and a sum of money secured on a mortgage, being dissatisfied with the income she received, consulted a firm of solicitors and saw their managing clerk, who conducted the conveyancing business of the firm without supervision. Acting as the representative of the firm, he induced her to give him instructions to sell the cottages and to call in the mortgage money, and for such purpose to hand to him the deeds (for which he gave a receipt in the firm's name) and to sign two documents, which were not read over or explained to her, and which she believed she had to sign in order to effect the sale of the cottages. The documents so signed were in fact a conveyance to the clerk of the cottages and a transfer to him of the mortgage, and he then disposed of the same for his own benefit. It was held that the firm were responsible for the fraud of their representative committed in the course of his employment.

In *Ogilvie* v. *West Australian Mortgage, etc., Corporation* (*t*) certain entries debited by a bank to its customer were in respect of cheques forged by one of its servants. The customer was first informed thereof by the bank's accredited agent, who requested his silence; he made no complaint, doing so honestly and with a view to what he believed to be the bank's interest, and was held not estopped from relying on the forgery.

(*q*) See also *Ruben* v. *Great Fingall Consolidated Co.*, [1906] A. C. 439; *Swan* v. *N. B. Australasian Co.*, 2 H. & C. 175; *Carr* v. *L. & N. W. Ry. Co.*, L. R. 10 C. P. 307; *Biggs* v. *Evans*, [1894] 1 Q. B. 88; *Robinson* v. *Montgomery Brewery Co.*, [1896] 2 Ch. 841; *Union Credit Bank* v. *Mersey Docks, etc., Board*, [1899] 2 Q. B. 205, 210; *Solomon* v. *Attenborough*, [1912] 1 Ch. 451; [1913] A. C. 76; Buckley (10th ed.), p. 50.

(*r*) [1912] 3 K. B. 282.

(*s*) [1912] A. C. 716.

(*t*) [1896] A. C. 257.

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In the *London Joint Stock Bank* v. *McMillan & Arthur* (*u*) it was held by the House of Lords that a customer of a bank owes a duty to the bank in drawing a cheque to take reasonable and ordinary precautions against forgery. The plaintiffs M. & A. had in their employ a clerk to whom they entrusted the duty of filling in cheques for signature. He presented to a partner for signature a cheque drawn in favour of the firm or bearer. There was no sum in words written on the cheque in the space provided for writing, but in the space provided for figures there were the figures "2 0 0." The partner signed the cheque, and the clerk subsequently wrote on the cheque the words "one hundred and twenty pounds," and changed the "2 0 0" into "120 0 0," and obtained payment of the amount from the bank. Held, that there had been a breach of the firm's duty to take reasonable precautions against forgery, and that the bank was entitled to debit the firm's account with the full amount of the cheque.

In *Bloomenthal* v. *Ford* (*x*) a person being requested to lend money to a company on the security of fully paid shares of the company, did so, receiving certificates that he was holder of 10,000 fully paid shares. No money had in fact been paid on the shares, which were issued from the company direct to the lender, who did not know this, but believed the representation that they were fully paid. An order for winding up the company having been made, it was held that the company and liquidator were estopped from denying that the shares were fully paid (*y*).

In *Re Eddystone Marine, etc., Co.* (*z*) a private company passed resolutions allotting certain shares as fully paid up to the directors, and a contract was executed between the company and the allottees, and duly registered, by which it was agreed that such shares should be allotted to them in consideration of services rendered. The contract recited that the company was indebted to the allottees for services rendered and expenses incurred. There was in fact no consideration for the allotment, and in the winding-up the liquidator placed the allottees on the list of contributories, and Wright, J., held they were rightly so placed. The Court of Appeal affirmed his decision, rejecting the argument that the company were estopped by the recitals, as the facts were known to all parties, and the

(*u*) [1918] A. C. 777. Cf. *Paine* v. *Bevan*, 110 L. T. 933.
(*x*) [1897] A. C. 156.
(*y*) Cf. *Burkinshaw* v. *Nicolls*, 3 A. C. 1004.
(*z*) [1893] 3 Ch. 9.

company could not do something which was *ultra vires* by putting an untruth into the document.

On the other hand, in *Re Building Estates Co., Parbury's Case* (*a*), an estoppel was allowed under these circumstances. P gave W £500 on a promise to secure an allotment of shares in a new company. W was entitled under an agreement (not filed) to a certain number of fully paid shares, and, after the company was incorporated, W caused one hundred shares to be allotted to P as his nominee. The certificate issued to P untruly stated that the shares were fully paid. The company never received any of the £500 and P never repudiated the shares. It was held that P was not liable to be placed on the list of contributories.

Where a company registers a transfer of shares and issues a certificate to the transferee, the certificate amounts to a statement intended to be acted on by purchasers that the transferee is entitled to the shares, and the company is estopped from denying its truth (*b*). If, however, the purchaser relies not on the certificate, but on a transfer from the holder, which is in fact a forgery, then the company is not estopped from denying the transferee's title (*c*).

In order to fix a director with liability in respect of his qualification shares, when they have been registered in his name without any application by him and without his knowledge, it must be shown that he acted as a director at a time when he could not properly so act without possessing the qualification (*d*). In any other case he is not estopped, and there is no need for him to take such shares direct from the company (*e*), and a statement in a prospectus that the directors would take all the ordinary shares which were not taken by the vendors is a mere statement of intention and will not estop (*f*).

In *Robinson* v. *Montgomery Brewery Co.* (*g*) a company applied

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(*a*) [1896] 1 Ch. 100; and see *Re Coasters, Ltd.*, [1911] 1 Ch. 86.

(*b*) *Re Bahia, etc., Ry. Co.*, L. R. 3 Q. B. 584; *Hart* v. *Frontino*, L. R. 5 Ex. 111; *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396; *Re Ottos Kopje, etc., Mines*, [1893] 1 Ch. 618; *Re Concessions Trust, McKay's Case*, [1896] 2 Ch. 757; *Dixon* v. *Kennaway*, [1900] 1 Ch. 833; *Re Coasters, Ltd., supra.*

(*c*) *Simm* v. *Anglo-American Telegraph Co.*, 5 Q. B. D. 188; *Foster* v. *Tyne Pontoon, etc., Co.*, 63 L. J. Q. B. 50. Cf. *The Sheffield Corp.* v. *Barclay*, [1905] A. C. 392; *Bank of England* v. *Cutler*, [1908] 2 K. B. 208.

(*d*) *Re Printing, etc., Co., ex p. Cammell*, [1894] 1 Ch. 528; *Re Portuguese, etc., Mines, ex p. Lord Inchiquin*, [1891] 3 Ch. 28; *Molyneux* v. *London, etc., Co.*, [1902] 2 K. B. 589.

(*e*) *Re Metropolitan Public Carriage Co., Brown's Case*, L. R. 9 Ch. 102.

(*f*) *Re Moore Brothers & Co.*, [1899] 1 Ch. 627. (*g*) [1896] 2 Ch. 841.

to its broker for a loan of £3,000 on security of £8,000 debenture stock which, by the trust deed, was assignable free from equities. He asked G to lend £6,000, and the company issued a certificate that G was holder of £8,000 debenture stock. G thereupon paid the broker £6,000, and the latter paid the company £3,000. Held that, although the certificate was not a negotiable instrument, G was entitled to assume that the broker had full authority to deal with it, and he was not bound to see that the company actually received the money (*h*).

In *The Colonial Bank* v. *Cady* (*i*), certain shares in a New York company were vested in the executors of W. The certificates were so framed as to contemplate the holder of them being entitled to transfer them by a form which, though on the same paper as the certificate, was a separate instrument, and, when signed by the person who on the face of the instrument was stated to be the owner, purported to transfer to someone else the property in the shares. The executors, in order to get themselves registered in the books of the company, entrusted the certificates to B, who, in fraud of the trust reposed in him, pledged the certificates with the bank to raise money for himself. The shares were not negotiable instruments, and the executors had been informed that to obtain registration they must sign their names on the form printed on the certificates, which they did without filling up the blanks. They never intended to part with the property in them. It was held by the House of Lords that the form of the transfer was equally consistent with either of the two purposes that the executors were going to transfer to someone else or that they were signing in order to get themselves registered. That the bank, therefore, must be taken to have known that the possession of B was consistent with either of such purposes, and that it could not assume, when dealing with a broker in possession of such certificates, that he had authority to complete a transfer, and that, therefore, the executors were not estopped from setting up their title against the bank (*k*). But a person who takes *negotiable* securities in good faith and for value will obtain a good title though he takes from one who had none (*l*).

(*h*) See also *Roberts* v. *Security Co.*, 13 T. L. R. 79. (*i*) 15 A. C. 267.

(*k*) See *Bentinck* v. *London Joint Stock Bank*, [1893] 2 Ch. 140, 144; and cf. *Fry* v. *Smellie*, [1912] 3 K. B. 282; *Fuller* v. *Glyn, Mills & Co.*, [1914] 2 K. B. 168.

(*l*) *London J. S. Bank* v. *Simmons*, [1892] A. C. 201; *Edelstein* v. *Schuler*, [1902] 2 K. B. 144. Cf. *London Joint Stock Bank* v. *Macmillan*, [1918] A. C. 777.

Savage v. Foster.

As to bills of exchange, cheques, and other negotiable instruments, questions may arise between the holder and persons liable on the bill, or between the banker and his customer. It has been established that the original payee of a cheque is not a holder in due course within the Bills of Exchange Act, 1882 (*m*).

Where a person signs a blank stamped paper and hands it to another to issue as a negotiable instrument, he impliedly authorises the paper to be filled up to the full amount allowed by the stamp (*n*). But that does not apply where the blank paper is only entrusted to an agent for safe custody, and with no authority to issue it without further instructions (*o*).

No estoppel arises against a person who has been induced to sign a promissory note by a fraudulent representation that he is witnessing a deed, and, at the time he does so, he believes the representation and has no knowledge of the existence of the note, and the jury acquit him of negligence (*p*).

The acceptor of a bill of exchange is not under any duty towards subsequent holders to take precautions against fraudulent alterations after acceptance, and where such alterations were made in spaces left blank it was held that the acceptor was not estopped from proving that he had only accepted for the original amount (*q*).

The mere fact that a customer of a bank takes his pass-book out of the bank and returns it without objecting to any of the entries contained therein (there being a pencil entry of the balance) does not amount to a settlement of account as between him and the bank in respect of these entries (*r*).

Analogous to the doctrine of estoppel is the rule of law laid down

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(*m*) *Jones, Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A. C. 670.

(*n*) *Young* v. *Grote*, 1 Bing. 253, explained in *London Joint Stock Bank* v. *Macmillan, supra; Scholfield* v. *Londesborough*, [1896] A. C., at p. 536; *Lloyds Bank* v. *Cooke*, [1907] 1 K. B. 794; *Glennie* v. *Bruce-Smith*, [1908] 1 K. B. 263; *Smith* v. *Prosser*, [1907] 2 K. B., at p. 752; *Morison* v. *L. C. & W. Bank*, 30 T. L. R. 481. *Herdman* v. *Wheeler*, [1902] 1 K. B. 361, is not a case of estoppel.

(*o*) *Smith* v. *Prosser*, [1907] 2 K. B. 735. Cf. *Swan* v. *N. B. Australasian Co.*, 2 H. & C. 175; *Paine* v. *Bevan*, 110 L. T. 933; *Morison* v. *L. C. & W. Bank, supra.*

(*p*) *Lewis* v. *Clay*, 67 L. J. Q. B. 224; *Bank of Ireland* v. *McManamy*, [1916] 2 Ir. R. 161; and see *Jones, Ltd.* v. *Waring & Gillow, Ltd.*, [1926] A. C. 670.

(*q*) *Scholfield* v. *Londesborough*, [1896] A. C. 514; *Imperial Bank of Canada* v. *Bank of Hamilton*, [1903] A. C. 49; *Colonial Bank of Australasia* v. *Marshall*, [1906] A. C. 559. As to the duty of a customer to a bank to take reasonable precautions against forgery, see above, p. 412.

(*r*) *Keptigalla Rubber Estates, Ltd.* v. *National Bank of India, Ltd.*, [1909] 2 K. B. 1010.

in *Collen* v. *Wright* (*s*), which has been recently considered by the Courts in relation to the position of stockbrokers. In *Starkey* v. *Bank of England* (*t*), a broker applied to the Bank of England for a power of attorney for the sale of consols. He believed he was instructed by the stockholder, and *bona fide* induced the bank to transfer the consols to a purchaser upon a power of attorney on which the stockholder's signature was forged. It was held that the broker had impliedly warranted his authority, and was therefore liable to indemnify the bank against the stockholder's claim for restitution. The same rule was applied in *Sheffield Corporation* v. *Barclay* (*u*), where the bank had innocently sent to the plaintiffs a forged transfer to be registered. In all these cases, it is a question of fact. Was the plaintiff, being invested with a duty of a ministerial nature, called upon to exercise that duty at the request, direction, or demand of the defendant? If he was, and thereby incurred liability to third parties, there is implied by law a contract by the defendant to indemnify the plaintiff against the liability (*x*).

3. Infancy and Coverture.

The law on this subject is well summed up in the principal case as follows: "In the case of fraud, *infancy or coverture shall be no excuse;* for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and feme coverts, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet, when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary that such infant or feme covert should be active in promoting the purchase, if it appears that they were so privy to it that it could not be

(*s*) 8 E. & B. 647; *Yonge* v. *Toynbee*, [1910] 1 K. B. 215; cf. *Fornée* v. *Gorlitz*, [1915] 1 Ch. 177.

(*t*) [1903] A. C. 114.

(*u*) [1905] A. C. 392.

(*x*) *Per* Lord Davey, [1905] A. C., at p. 399; *Bank of England* v. *Cutler*, [1907] 1 K. B. 889; [1908] 2 K. B. 208.

done without their knowledge." As the law now stands, however, the statements in this passage require considerable qualification in the case of infants, and also in the case of married women restrained from anticipation.

Infants.—Where a person enters into a contract during his minority, he is not, either at law or in equity, bound thereby after his majority on the mere ground that without any false assertion on his part the other party believed him to be of age (*z*). And the mere fact that an infant carries on trade is not a representation that he is of age (*a*).

The principle acted upon by the Court of equity is that an infant shall not take advantage of his own wrong; in cases where restitution, or partial restitution, is practicable (*b*). In *Clarke* v. *Cobley* (*c*) a woman, at the time of her marriage, was indebted on two promissory notes. After the marriage the husband gave his bond for the amount to the creditor, who thereupon delivered up the notes. The bond having been put in suit, the husband pleaded his infancy at the time of giving the bond. On a bill being filed in equity for relief, the Court ordered the notes to be returned to the plaintiff with directions that the defendant should not plead the Statute of Limitations to any action the plaintiff should bring on the notes, or any other plea which the defendant could not have pleaded at the time the bond was given. And in *Lemprière* v. *Lange* (*d*) a lease obtained by an infant upon an implied representation that he was of age was set aside as void on the ground of fraud, and possession was ordered to be given up.

Although a mortgage by an infant, falsely representing himself to be of age, might be good (so far as regards the charge on the property) as against himself, nevertheless it will not be good as against a subsequent mortgagee who advances his money after the infant has attained his majority, without notice of the first mortgage. In *Inman* v. *I.* (*e*) an infant charged his reversionary interest in a fund with payment of a sum lent to him upon his promissory note, and executed a statutory declaration stating (untruly) that he was

(*z*) *Stikeman* v. *Dawson*, 1 De G. & Sm. 90. But see *Goode* v. *Harrison*, 5 B. & Ald. 147; *Belton* v. *Hodges*, 9 Bing. 365, at p. 369; *Levene* v *Brougham*, 25 T. L. R. 265.

(*a*) *Ex p. Jones*, 18 Ch. D. 109; *Cowern* v. *Nield*, [1912] 2 K. B. 419.

(*b*) See the judgment of Lord Sumner in *R. Leslie, Ltd.* v. *Sheill*, [1914] 3 K. B., at p. 618.

(*c*) 2 Cox, 173.

(*d*) 12 Ch. D. 675.

(*e*) 15 Eq. 260; Pollock (9th ed.), p. 81.

then of full age. After attaining twenty-one, he mortgaged his interest in the fund for an amount exceeding what was ultimately available, without disclosing the fact of the prior charge. It was held by Bacon, V.-C., that the charge given by the infant during his infancy and incapacity to contract was avoided by the subsequent mortgage executed by him, when of full age and capable of contracting, to a mortgagee without notice.

In *Stocks* v. *Wilson* (*f*), the defendant, an infant, by fraudulently representing that he was of age, induced the plaintiff to sell and deliver to him certain furniture and effects which were not necessaries. The defendant afterwards sold some of the goods for £30, and (with the assent of the plaintiff or her agent) granted a bill of sale of the residue to secure an advance of £100. Held, that the defendant must account for the sums of £30 and £100. "For the more complete protection of an infant," said Lush, J., "the law prevents the other contracting party not only from suing on the contract, but also from suing for damages, if the fraud is connected with and forms the inducement to the contract. Nor is the infant estopped from proving the true facts. . . . What the Court of equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. . . . If the infant has obtained property by fraud he can be compelled to restore it; if he has obtained money he can be compelled to refund it" (*g*). The words "if he has obtained money he can be compelled to refund it," in this passage, must be taken to refer to such a case as that then before the Court, where money had been obtained by means of property acquired by fraud.

The doctrine of equitable relief against an infant who has fraudulently represented himself to be of full age was discussed by the Court of Appeal in *R. Leslie, Ltd.* v. *Sheill* (*h*). In that case the defendant, by representing that he had attained twenty-one, induced the plaintiff to lend him two sums of £200 each. The plaintiff sued to recover the £400 and interest on the ground that the defendant had obtained the money by fraud, and alternatively the plaintiff claimed the same sum as money had and received. The defendant was still an infant when the writ was issued, but attained twenty-one before trial. Horridge, J., gave

(*f*) [1913] 2 K. B. 235.
(*g*) [1913] 2 K. B., at p. 242.
(*h*) [1914] 3 K. B. 607.

judgment for the plaintiff, but was overruled by the C. A. upon the ground that the action was in substance *ex contractu*. After reviewing the earlier cases, Lord Sumner in his judgment referred to the decision of Lush, J., in *Stocks* v. *Wilson*, and proceeded: "I think it is plain," said Lord Sumner, "that Lush, J., conceived himself to be merely applying *the equitable principle of restitution*. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the value of the goods, which he could not restore because he had sold them. The argument was that equity would not allow him to keep the goods and not pay for them . . . and that he could not better his position by having put it out of his power to give up the property." Lord Sumner then criticised the *dictum* in the judgment of Lush, J., that if an infant has obtained money he can be compelled to refund it, and proceeded: "The decision in *Stocks* v. *Wilson* is distinguishable from the present case and is independent of the above *dictum* and I need express no opinion about it. In the present case the money was paid over in order to be used as the defendant's own. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum. . . . So far as I can find the Court of Chancery never would have enforced any liability under circumstances like the present any more than a Court of law would have done so, and I think that no ground can be found for the present judgment which would be an answer to the Infants Relief Act."

Although an infant may falsely represent himself of age, a person aware that he was not of age, and who was therefore not deceived by such representation, cannot obtain relief in equity (*i*).

An infant known to the other party to be so, is not bound by acquiescence, as by allowing another to act on the faith that the infant will do or not do certain things, but if the acquiescence or untrue representation continue after twenty-one, he will be bound (*k*).

Married Women—Savage v. *Foster* is said to be the only case where the Court decreed a wife to levy a fine (*m*). A married

(*i*) *Nelson* v. *Stocker*, 4 De G. & J. 458.

(*k*) *Goode* v. *Harrison*, 5 B. & Ald. 147; *Belton* v. *Hodges*, 9 Bing. 365; Simpson (4th ed.), p. 77.

(*m*) See *Cahill* v. *C.*, 8 A. C., at p. 422 *arguendo*.

woman has now by law full power of control and alienation over her property, real and personal, except in the rare and diminishing number of cases where the woman was married before January 1, 1883, and is still under coverture, and the title to the property accrued before that date (*n*).

There is a wide difference between holding a married woman not bound by a contract and holding her not bound by misrepresentation and fraud (*o*); and in cases governed by the old law, she has frequently been held bound by equitable estoppel (*p*).

A married woman restrained from anticipation is unable to bind her interest by admission (*q*). She "cannot by hook or by crook, by any device—even by her own fraud (the cases go that length)—deprive herself of the protection which the restraint on anticipation throws around her" (*r*). A married woman, however, is free to disclaim an interest which a testator has bequeathed to her with a restraint upon anticipation (*s*).

In *Bagot* v. *Chapman* (*t*) a married woman, entitled to a reversionary interest, was induced by her husband to execute a document which he represented to be a power of attorney enabling him to raise money at some future time. It was, in fact, a mortgage of a reversionary interest with a personal covenant for payment by the wife. The wife knew that if her husband did raise money on the document it would come out of her interest, but she did not intend to create a present charge or incur any personal liability. It was held she was at liberty to plead *non est factum*, and consequently was not estopped from setting up her title against the mortgagee.

(*n*) Married Women's Property Acts, 1882, 1893 and 1907.

(*o*) *Per* Giffard, L.J., in *Re Lush's T.*, L. R. 4 Ch., at p. 601.

(*p*) See *Vaughan* v. *Vanderstegen*, 2 Drew. 363, 378, 379.

(*q*) *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144.

(*r*) *Per* Lindley, M.R., in *Bateman* v. *Faber*, [1898] 1 Ch., at p. 149; and see *Sprange* v. *Lee*, [1908] 1 Ch. 424. Cf. *Macnaghten* v. *Paterson*, [1907] A. C. 483.

(*s*) *Re Wimperis*, [1914] 1 Ch. 502.

(*t*) [1907] 2 Ch. 222, but see *Howatson* v. *Webb*, [1908] 1 Ch. 1 (C. A.).

GUARDIAN AND WARD.

MR. JUSTICE EYRE *v.* COUNTESS OF SHAFTSBURY.

1722. 2 P. W. 103; Gilb. Eq. Rep. 172.

Guardian and Ward.

A guardianship, devised to three persons, without saying "and to the survivors or survivor of them," yet the survivor shall have it (*a*).

The right of the testamentary guardian, by the express words of the Act of Parliament, takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

The mother of a ward of the Court, contriving and effecting his marriage, without obtaining the consent of the testamentary guardian, or making an application to the Court, is liable for a contempt of the Court, although the marriage be in other respects proper.

THE late Earl of Shaftsbury, by his will, dated November 10, 1710, devised the guardianship of the person and estate of his infant child (the present Earl) to Eyre, J., and two others (since deceased), without saying "and to the survivor of them"; and this devise of the guardianship was until the child should come to twenty-one years of age.

Lord Shaftsbury died beyond sea, and the infant earl was now twelve years of age, when Eyre, J., perceiving that his lordship had not a proper governor provided for him by the countess his mother, and that the person who was ordered to attend him as his gentleman was not a fit person for that purpose, petitioned the Lord Chancellor that he, as sole surviving guardian, might have the ordering, as he should think proper, of such governor, gentleman, and other servants to attend the said infant earl; and that the person of the said infant earl might be delivered over to the petitioner (*b*).

(*a*) *S. C.*, 2 Eq. Ca. Abr. 710, pl. 3; 755, pl. 4.

(*b*) The arguments, which are dealt with in the judgments, have been omitted.

Eyre v. Countess of Shaftsbury.

Lord Chancellor Macclesfield.—The father, by the statute (*c*), has a right to dispose of the guardianship of his child until twenty-one, and, having done so here, it will be (*d*) binding, unless some misbehaviour be shown in the guardian, in which case, it being a matter of trust, this Court has a superintendency over it.

But as to the objection, that this right of guardianship does not survive, because it is not said in the will in express terms that it shall go to the survivor, there seems to be no colour for it; because, where several guardians are appointed by a will, each of them seems to be a complete guardian, like the case where there are two or three churchwardens of a parish, each of them is a distinct churchwarden; and it would be mischievous, and of very ill effect, if, where there are several guardians appointed by a will, and some refuse to act, that the rest should not be able to do anything; and yet this must be the consequence if a guardianship devised to several should be taken to be one joint naked authority; such construction would make the Act of little force. A guardian has an authority coupled with an interest, and may bring a *writ of ravishment* of ward (*e*) on the infant's being taken from him; and though it is true that the damages recovered shall, by the statute, go towards the benefit of the ward, yet the declaration must lay it *ad damnum* of the guardian the plaintiff.

The reason of *Auditor Curle's Case* (*f*), where, on the office of auditor being granted to two, without saying "and to the survivor," such office, on the death of one, was held to be determined, was because, in such case, both made but one officer, as the two sheriffs of Middlesex make, as to their office, but one

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(*c*) 12 Car. 2, c. 24, s. 8.

(*d*) See *Dillon* v. *Lady Mountcashell*, 4 Bro. P. C. 366, Toml. ed.

(*e*) This writ was given by the Stat. West. 2 (13 Edw. 1, c. 35) to the Guardian in Chivalry to recover the body of the ward. And by the equity of Stat. West. 2 (13 Edw. 1, c. 24), which gave a writ *in consimili casu* the guardian in socage might have ravishment of ward. Military tenures were abolished by 12 Car. 2, c. 24, by which an action of ravishment of ward or trespass was given to the testamentary guardian. The writ *in consimili casu* was abolished by 3 & 4 Will. 4, c. 27, s. 36, and the ordinary remedy to recover the body of an infant either by the father or the guardian is now by *habeas corpus*. See *Re Marston*, 17 W. R. (Q. B. Ir.) 794.

(*f*) 11 Co. 2 *b*.

person. In the present case, here is a plain right placed and vested in Eyre, J., as the surviving guardian, and who, everyone is assured, will well execute such trust, which it will be impossible for him to do without being allowed to place and choose the governor, gentleman, etc., to attend upon and take care of this young nobleman.

And, though Dr. Stubbs may be a good, learned, and pious man, yet he may not be so fit to attend the young earl to all places; for instance, to courts, places of exercise and diversion, etc., at which it may be proper for his lordship to appear.

But I must differ from Eyre, J., as to sending the infant to a public school, which may be thought likely to instil into him notions of slavery.

Wherefore, *per Cur.*, discharge Dr. Stubbs from being governor, as also Mr. Bennett from being gentleman, and deliver the infant into the hands of his guardian, Eyre, J., who desired the young earl might dine with him. But the Lord Chancellor said, that this was in confidence, that the Judge should return him to his mother the countess, at night; for that, as yet, the Court would not make any order touching the custody of the earl's person.

Afterwards, on the Great Seal's being taken from the Earl of Macclesfield, and placed in the hands of three Lords Commissioners, on March 18, 1724, Eyre, J. (lately made Lord Chief Baron of the Exchequer), exhibited his petition to the Lords Commissioners, setting forth the former proceedings; and that the infant earl, who was now just fourteen years of age, and had been married to Lady Susannah Noel, daughter to the Countess of Gainsborough, was detained from the petitioner; that such marriage was *without the consent or privity* of the said Lord Chief Baron, the surviving guardian. Therefore the petitioner thought it his duty to lay these things before the Court, praying that the custody or tuition of the infant lord might be granted to him, and that the Court would make such order touching this matter as they should think proper.

Upon this the Dowager Countess of Shaftsbury petitioned the Lords Commissioners, that the order of the late Lord Maccles-

field, declaring the right of guardianship to belong to Eyre, L.C.B., and directing the person of the infant earl to be delivered to the said Lord Chief Baron, might be set aside.

Also, the infant earl petitioned the Lords Commissioners, insisting that the guardianship of his lordship, given by the will, was determined by the death of two of the guardians, and praying that his lordship, being now of the age of fourteen years, might be at liberty to choose his guardian.

On hearing these petitions the Court ordered a sequestration, unless cause, both against the Countess (dowager) of Shaftsbury, and against the Countess of Gainsborough, for their contempt in contriving and effecting this marriage without the consent of the guardian, and without applying to the Court. And the person of the infant earl was ordered to be restored by the Countess Dowager of Shaftsbury to the Lord Chief Baron, it being the opinion of the Court, that though the declaration made by the late Lord Chancellor that the right of guardianship did belong to the Lord Chief Baron, as surviving guardian, and the order made thereupon was ever so erroneous, yet that the same was a good order until reversed, and, consequently, it was a contempt to break it.

Judgment by the Lords Commissioners.—On May 15 the three Lords Commissioners, *viz.*, Sir Joseph Jekyll, M.R., Gilbert, B., and Raymond, J., having heard this matter solemnly argued by counsel on both sides, gave their judgment, which was delivered by the Lord Commissioner Jekyll, that the Court were all of opinion the sequestration against the Countess of Shaftsbury ought to be absolute.

Lord Commissioner Jekyll.—The marriage of a ward without the consent of the guardian is a ravishment of the ward (*g*), and aggravated in this respect, that, after such ravishment by marriage, the ward cannot be restored to such condition as he was in before, it being rendered impossible by the wrong of the ravisher. [His lordship referred to the Statute of Westminster 2 (*h*), relating to ravishment of wards.]

(*g*) 2 Inst. 440.

(*h*) 13 Edw. 1, c. 35.

Eyre v. Countess of Shaftsbury.

And the matter of marrying infants without the proper consent of guardians, is provided against, both at law and in this Court, especially the latter, it being notorious that a Court of equity entertains no greater jealousy of, nor shows more resentment against anything than the unlawful marriage of infants.

In the case of the marriage of a lunatic, *viz.*, that of Mr. Packer's marrying Mrs. Ash (*i*), the Court committed Mr. Packer, the parson, and others that were their agents, and Packer continued in custody for a considerable time; and infants and lunatics may be compared together, both of these being unable to take care of themselves.

In the case where an infant is committed by the Court to the custody or care of any one, such committee gives a recognisance that the infant shall not marry without leave of the Court, which form is very rarely altered, and on special circumstances; so that, if the infant marries, though without the privity, or knowledge, or neglect of the committee, yet the recognisance is, in strictness, forfeited, whatever favour the Court upon application may think fit to show such committee, when he appears not to have been in fault (*k*).

In Lord Somers's time, Mr. Goodwin married an infant (Mrs. Knight), and was committed, and this commitment was followed by an Act of Parliament for dissolving the marriage.

So, on Sir Edward Hannes's daughter and heir, who was an infant, being inveigled from her guardian, Dr. Waugh, and married to one Willis, though Mrs. Hannes was not taken from a guardian assigned by the Court, yet, in that case, both Mr. Willis, and the parson, and the agents, were all committed by the Master of the Rolls, Sir John Trevor, and the order afterwards confirmed by Lord Harcourt.

And, as this Court punishes the instruments where such marriage is had without the consent of the guardian, so, if there be only an apprehension that the infant will be married

(*i*) See *Packer* v. *Wyndham*, Prec. Ch. 412.

(*k*) See *Dr. Davis's Case*, 1 P. W. 698; but this practice has some time since been discontinued, except perhaps in the case of a female ward being allowed to go out of the jurisdiction : *Jeffrys* v. *Vanteswarstwarth*, Barn. 144, 145.

unequally, either by the guardian or by his neglect, a Court of equity will interpose, and send for the infant and commit him to the custody of a proper person, or relation, in order to prevent such danger: as was done in the case of the infant Lady Catherine Annesley, by Harcourt, L.C., and likewise in another case, *viz.*, that of Mr. Vernon, of Staffordshire, by Lord Macclesfield (*l*).

But the present case is still of a higher nature, as it is the case of a peer of the realm, in whose education the public is interested, and where the guardianship of him is devised by a peer of the realm, *viz.*, by the will of the late Lord Shaftsbury.

As to the objection that has been made to the order of this Court, that there are no words therein, that the infant shall not be married without the consent of the guardian:

Resp. The Court could not suppose, or foresee, that any person would marry the infant without the guardian's consent; and, for that reason, there was no express provision against it in the order; but still this prohibition is implied, *viz.*, that no person, without the leave of the guardian, should marry this infant; besides, by the same reason that these words ought to be inserted, the order should likewise have provided that no person should take away or ravish this ward from the guardian, etc., all which things are surely implied; but, further, it is a sufficient answer to this objection, that such negative words are never inserted in the order.

But then it is objected, here is no disparagement in this marriage; forasmuch as the birth of the noble lady to whom Lord Shaftsbury is married, and also her quality, are equal to those of her husband; and she has had the advantage of being educated under the Countess of Gainsborough, her mother, a lady of great honour, virtue, and quality.

Resp. Admitting all this to be so, yet it may be reasonably supposed, that, if the infant earl had staid till he had attained his age, and could have made a jointure and settlement, in such case his Lordship might have had a better portion.

But, in reality, though there be no disparagement, yet this

(*l*) See *Lord Raymond's Case*, Cas. t. Talbot, 58; *Smith* v. *S.*, 3 Atk. 304.

is only by way of extenuation, and can never be urged as a justification; for, it is the marriage without the consent of the guardian that constitutes the offence, so that, such marriage having been to one of equal degree and fortune, can at most tend but to extenuate.

And it is observable, that the disparagement of the ward was not where such ward, without the guardian's consent, married one of inferior degree, as a villein, citizen, or burgess, but where the guardian himself married the ward to one of inferior degree; for which see the Statute of Merton, cap. 6 & 7, 2 Inst. 89—92.

Object. The punishment of this ravishment of ward by sequestration, or otherwise, would be fruitless, since the marriage, having been once solemnised and perfected, the same cannot be afterwards rescinded or dissolved.

Resp. The like objection might be made, though the marriage were ever so much to the disparagement of the ward; but in all these cases the reason of inflicting punishments is for example's sake, and to deter others from the like offence of ravishment of wards.

Object. This marriage is by the Countess, the mother of the infant earl, who is guardian by nature and nurture, and so cannot be guilty of ravishment of ward.

Resp. The right of a testamentary guardian takes place of a guardianship by nature; by the express words of the Act of Parliament (*m*), the guardian by will takes place of all other guardians, and his authority, by that law, is a continuation of the paternal authority.

Object. There is no instance of any one case, where a complaint has been against an infant's mother, for taking away her own child.

Resp. The Lords Selkirk and Orkney, guardians of the infant Duke of Hamilton, petitioned against the Duchess of Hamilton for taking away the infant Duke out of their custody, and their complaint was received; upon which the Court would have proceeded against the mother, but the guardians could not make

(*m*) 12 Car. 2, c. 24.

out their right of guardianship by reason of some defect in the instrument under which they claimed.

So that, all these objections being answered, the Court are of opinion, that the sequestration against the Countess Dowager of Shaftsbury ought to be made absolute.

As to the case of Lady Gainsborough, that seems to differ; and here the question is, whether the Countess of Gainsborough's consenting that her daughter should be married to the infant earl, be not a contempt?

8 Edw. 3, c. 52. The case was a writ of ravishment of ward, which was brought against four men and a woman: the men took away the ward, and the woman, knowing that the four men had taken away the ward, married the ward to her daughter, upon which Herle, C.J., gave the rule, that the woman was equally guilty with the four men of the ravishment of the ward, the marriage of the infant, without the consent of the guardian, constituting the offence; and though the guardian be not appointed by the Court, nor any commitment made by the Court of the infant, yet have those been punished who have married the ward without the consent of the guardian, as appears from the above cited case of Mrs. Hannes, where the case was nothing more than that of marrying the infant without the consent of the testamentary guardian, and the decree was only for an account of Sir Edward Hannes, the father's personal estate, and for an allowance of maintenance for the infant.

Whereas, in the principal case, the decree goes something further, as it directs that the will of the late Earl of Shaftsbury should be performed, part of which will is, that the infant earl should be under the care and guardianship of the persons named therein.

In 3 Co. 38 (*Ratcliffe's Case*), it was resolved, that every ancestor, whether male or female, might bring an action of trespass or ravishment of ward against any one for taking away his heir-apparent, male or female, and for marrying such heir; and that it is not material of what age such heir then was; and as the ancestor might bring such action for taking away and

marrying the heir, so also might the guardian for taking away and marrying the ward.

It does not appear that the late Earl of Gainsborough left any testamentary guardians of his children; so that as the Countess was guardian of them by nature, the marriage of her daughter belonged to her: consequently it is to be presumed that she married her daughter to the infant earl; at least, if she did not, she may purge herself by oath.

But it is material that Eyre, L.C.B., the guardian of the infant earl, has not, in his petition, made out any direct charge, or prayed anything against the Countess of Gainsborough; and, possibly the Court may not be bound, *ex officio*, to punish for a ravishment of a ward where there is no complaint.

The Court has the care, but not the guardianship of infants; and Eyre, L.C.B., is not a guardian appointed by the Court (*n*), but by the will of the father, in which respect the Court is the less concerned.

And though the stat. 12 Car. 2, c. 24, says, that a testamentary guardian may maintain an action of ravishment of ward, if the infant be taken from him, yet the statute does not enjoin him to do it, but refers the same to the discretion of the guardian.

So that, in this case, forasmuch as the testamentary guardian has not complained of or prayed any redress against Lady Gainsborough, the Court will do nothing against her, but discharge the order of sequestration with respect to her (*o*).

And now we come to the petition of the infant Earl of Shaftsbury, where it is first objected, that though the Court might, upon a petition, make a provisional order for the taking care of an infant, yet that they ought not to make an order determining the right of guardianship, unless the matter be brought judicially before them by bill, answer, and proofs.

Resp. In this case here are a bill and answer, and both the will and the devise of the guardianship are set out by the bill; whereupon the decree says, that the trusts of the will shall be

(*n*) See *Goodall* v. *Harris*, 2 P. W 562.
(*o*) See *Herbert's Case*, 3 P. W. 116.

performed, one of which said trusts is the guardianship of the infant.

It is not material that the earl was defendant, for so it was in the case of Mrs. Hannes, who was married to Mr. Willis without the consent of the guardian; and this Court may upon petition only, without any bill or decree, make an order to determine the right of guardianship, in regard the care of all infants is lodged in the King as *pater patriæ*, and by the King this care is delegated to his Court of Chancery.

In F. N. B. 232, the King is bound, of common right and by the laws, to defend his subjects, their goods and chattels, lands and tenements, and by the law of this realm, every loyal subject is taken to be within the King's protection; for which reason it is, that idiots and lunatics, who are incapable to take care of themselves, are provided for by the King as *pater patriæ;* and there is the same reason to extend this care to infants.

This is the reason given in the writ *de idiota inquirendo*, which the King issues out to take care of him who *regimini sui ipsius et bonorum, et terrarum suarum minime sufficit*, which reason also appears in the writ *de lunatico inquirendo*; and in 4 Rep. 123, b. (*Beverley's Case*), infants, as well as idiots, are said to be under the care and protection of the Crown, as persons equally unable to take care of themselves.

In like manner, in the case of charity, the King, *pro bono publico*, has an original right to superintend the care thereof, so that, abstracted from the statute of 43 Eliz. c. 4, relating to charitable uses, and antecedent to it, as well as since, it has been every day's practice to file informations in Chancery in the Attorney-General's name, for the establishment of charities.

Also in the case of *Lord Falkland* v. *Bertie* (*p*), the Lord Somers, in delivering his opinion, takes notice, that several things are under the care and superintendency of the King, as he is *pater patriæ*, and instances in all charities, idiots, lunatics, and infants.

Indeed, several Acts of Parliament have made alterations in some cases of this nature, which so far stand altered, and no

(*p*) 2 Vern. 333.

further; but unless there be express words in an Act of Parliament for that purpose, the original jurisdiction of this Court remains as before; but there is not any one Act that has taken away the original jurisdiction of this Court with respect to this care and superintendency in the case of infants, charities, idiots, and lunatics. Since the statute which took away the Court of Wards (*q*), the jurisdiction of wardship returns to the Court of Chancery (*r*): and it appears by the Register 21, b. 198, that a writ may issue out of this Court to remove the guardian of an infant, and to put another guardian in his stead.

The law is particularly favourable to, and careful of an infant's interest; and though the infant himself cannot bring an account against the guardian, until his coming of age, yet a third person may bring a bill for an account against the guardian, even during the minority of the infant (*s*).

So in all decrees against infants, even in the plainest cases, a day must be given them to show cause when they come of age.

Lord Somers has often said, that this Court should be always open for petitions; and orders on petitions, in regard to the guardianship of infants, have not only been provisional, but in some cases decisive, as to the right of guardianship.

Thus, in the case of Lord Tenham and Barrett (*t*), there was no bill depending in this Court, but only a petition, desiring that Lady Tenham, the mother, being a Papist, might not have the guardianship of the infant, determined on petition against the mother: upon which an appeal was brought to the House of Lords, before whom it was never objected, nor once thought of, that this Court could not, on a petition only, determine the right of guardianship: and on the appeal the Lords also determined the right against the mother.

Also in the case of a testamentary guardian, such guardian

(*q*) Established by 32 Hen. 8, c. 46; 33 Hen. 8, c. 22. Abolished by 12 Car. 2, c. 24, s. 3. See Co. Litt. 77 a, 77 b.

(*r*) 2 Vern. 342.

(*s*) See *Pomfret* v. *Lord Windsor*, 2 Ves. Sen. 484.

(*t*) See 9 Mod. 40; 14 Vin. Ab., at p. 172, note to Ca. 1; 2 Eq. Ca. Abr. 16, nom. *Reynolds* v. *Lady Tenham; Lady Tenham* v. *Lennard*, 4 Bro. P. C. 302, Toml. ed.

having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity: no proofs of either side are requisite, or can avail; and therefore the matter is properly determinable upon a petition without a bill.

But in the last place it is objected, that, upon the wording of this will, the Lord Chief Baron has no right to the guardianship, the same being devised to him and two others, without saying, and to the survivor of them: and that this is a joint personal confidence wherewith three are intrusted, wherefore, by the death of any one, the guardianship is determined; and to prove that a guardianship is personal, it has been urged, that it is not assignable, nor will it go to executors or administrators.

Resp. I admit a guardianship is not assignable, neither will it go to executors or administrators; but for all that, it is coupled with an interest, and is not a naked authority. I admit, also, it has been said that where a naked authority is given to two, if one dies, the survivor cannot act; but the same book, *viz.*, 1 Inst. 112, 113, says that where an authority is coupled with an interest, it does survive. In the case of *Gardiner* v. *Sheldon* (*u*), the case of a guardian is compared to that of an executor or administrator, which is not assignable, but yet survives; and though a guardian be not in all respects to be compared to an executor, in regard the latter may continue his executorship, by appointing an executor by his will, yet the case of a guardianship devised to two is strictly like the case of an administration granted to two (especially where the debts amount to as much as the assets); for in that case, as well as in the case of two guardians, an administrator cannot assign his administratorship; it will not go to his executors or administrators, but to the surviving administrator (*x*); such an administrator is accountable to the creditor for everything, as much as the guardian is to the infant; such an administrator can make no profit.

And that a guardianship is coupled with an interest is most apparent, in that a guardian may bring an action and avow in

(*u*) *Quære Bedell* v. *Constable.* (Vaugh. 182).
(*x*) *Adams* v. *Buckland*, 2 Vern. 514; *Hudson* v. *H.*, Cas. t. Talbot, 127.

his own name, may make leases (*y*) during the minority of the infant, and may grant copyholds (*z*) even in reversion, as *dominus pro tempore*.

A guardianship is not properly an office, nor to be resembled (for instance) to the office of a parkership; for the former has an interest in the infant's estate; but a parker has no right or interest in the park, or land inclosed therein, and the owner of the land may determine such office by disparking the park or killing the deer; and whereas in Poph. 204, it is said that where the Lord Grey committed the custody of his son to four, and one of them died, the authority determined; this case is put upon the clause of the statute of 4 & 5 Phil. & Mar. c. 8 (*a*), which says, "that whosoever takes a damsel unmarried, and under the age of sixteen, out of the custody of their father or mother, or any such person to whom the father in his life-time, or by his will, or by any act in his life-time, has appointed the same, shall be subject to the pain of two years' imprisonment, or to the payment of such fine as the Court shall appoint." So that, by that Act, as to this special purpose, the father might by will or deed appoint the custody of his daughter, but such appointee had not the like interest as the guardian has: he had but a bare authority.

As to *Auditor Curle's Case* (*b*), that depended upon the statute of the 32 Hen. 8, c. 46; but in the principal case, when the now infant earl was so very young as not to be above a year old, and the testator had appointed him three guardians, it was hardly probable that the testator himself could imagine that all those three guardians should live until the child's age of twenty-one; and then to say, that the guardianship shall determine by the death of any one of the guardians would be to affirm that the more care the father takes of the child's education, the less it shall profit the child, because by the death of any one of these guardians the child shall be without a guardian, and the more

(*y*) 2 Roll. Abr. 41, pl. 4; but a lease by the testamentary guardians will be valid only during the minority of the ward: *Roe* d. *Parry* v. *Hodgson*, 2 Wills. 129; *Shaw* v. *S.*, Vern. & Scriv. 607. See Settled Land Act, 1925, s. 26.

(*z*) 2 Roll. Abr. 41, pl. 3.

(*a*) Repealed by 9 Geo. 4, c. 31.

(*b*) 11 Co. 2 b.

of them were appointed by the father, the less likelihood there would be that they all should live till the child should arrive to twenty-one.

Lord Commissioner Gilbert agreed with Lord Commissioner Jekyll, as did also Lord Commissioner Raymond.

NOTES.

1. Generally.
2. Guardianship by Nature and Nurture, p. 435.
3. Wards of Court, p. 437.
4. Testamentary Guardians, p. 445.
5. Jurisdiction of Court, p. 447.
6. Custody, p. 454.
7. Foreign Guardians, etc. p. 458.
8. Powers under Statutes, p. 459.

1. Generally.

The jurisdiction of the Court of Chancery over infants probably resulted from the right of the Crown over the persons and property of infants as *parens patriæ* where they have no other guardian. This jurisdiction was exercised by the Chancellor, as a part of the general delegation of the authority of the Crown, *virtute officii* (*c*), and whatever may be its origin it is now firmly established, and it is a settled maxim that the Crown is the universal guardian of infants and of their property (*d*).

Under the Judicature Act, 1925, s. 56, sub-s. 1 (b), causes and matters relating to " the wardship of infants and the care of infants' estates " are assigned to the Chancery Division of the High Court, and by section 44 it is provided that, subject to the provisions of any other Act, in questions relating to the custody and education of infants, and any other matter in which there was any variance between the rules of equity and of common law, the rules of equity are to prevail. The jurisdiction extends to infants who are not wards of Court and who have no property (*e*), although the Court

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(*c*) See *Re Spence*, 2 Ph. 247; *R.* v. *Gyngall*, [1893] 2 Q. B., at p. 246; *Thomasset* v. *T.*, [1894] P., at p. 299; and also *Wellesley* v. *W.*, 2 Bligh. (N.S.) 136; Co. Litt. 88 b, Hargrave's note (70); 2 Fonbl. Eq. 225; Story (3rd ed.), p. 557 *et seq.*; *Re McGrath*, [1893] 1 Ch. 143; Simpson, Infants (4th ed.), p. 106.

(*d*) *Wellesley* v. *Beaufort*, 2 Russ. 19; *Beaufort* v. *Berty*, 1 P. W. 703; *R.* v. *Gyngall*, *supra*.

(*e*) *Re McGrath*, [1893] 1 Ch. 143, C. A.; and see *Re Fynn*, 2 De G. & Sm., at p. 481; *Re Spence*, 2 Ph. 247; *Wellesley* v. *Beaufort*, 2 Russ., at p. 20.

cannot interfere with regard to the maintenance or education of infants, unless it has some means of providing for them (*f*); and it also extends over the whole period of infancy (*g*).

2. Guardianship by Nature and Nurture.

Rights of Father.—Passing over the different species of guardianships discussed in the principal case, some of which have been abolished such as guardianship in chivalry, guardianship in socage, guardianship by custom, guardianship by the appointment of the spiritual Courts, guardianship by election, and guardianship under stat. 4 & 5 Phil. & Mar. c. 8 (*h*), it was indisputable law that the father was the guardian of his legitimate children, though wards of Court, and entitled to their custody and control until they attained twenty-one years of age (*i*).

"The strict common law gave to the father the guardianship of his children during the age of nurture and until the *age of discretion* (*k*). The limit was fixed at fourteen years in the case of a boy and sixteen years in the case of a girl, but beyond this * * * the father had no actual guardianship except only in the case of the heir apparent, in which case he was guardian by nature till twenty-one * * *. But for a great number of years the term 'guardian by nature' has not been confined, so far as the father is concerned, to the case of heirs apparent, but has been used on the contrary to denote that sort of guardianship which the ordinary law of nature entrusts to the father, *until the age of infancy has completely passed and gone*" (*l*). And equity followed and gave effect to the common law conception of paternal authority, restraining the father's powers only where restraint was absolutely necessary for the welfare of the child.

The father had the right to determine questions relating to the

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(*f*) See *Re Agar-Ellis*, 24 Ch. D., at p. 332; *Re McGrath*, *supra*; *Thomasset* v. *T.*, *supra*; *Wellesley* v. *Beaufort*, 2 Russ., at p. 21.

(*g*) *Thomasset* v. *T.*, *supra*.

(*h*) See the notes of Mr. Hargrave, Co. Litt. 88 b., and Simpson on Infants (4th ed.), p. 149.

(*i*) See judgment of Brett, L.J., and Bowen, L.J., *Re Agar-Ellis*, 24 Ch. D., at pp. 326 and 336.

(*k*) See further as to this *R.* v. *Gyngall*, [1893] 2 Q. B., at pp. 250, 251; *Re Agar-Ellis*, 24 Ch. D., at p. 326; *Thomasset* v. *T.*, *infra*; *R.* v. *Lewis*, 9 T. L. R. 226; cf. *Re Connor*, [1919] 1 Ir. R. 361.

(*l*) *Per* Bowen, L.J., 24 Ch. D., p. 335; and see *Re Salisbury*, 2 Ch. D., at p. 31; *Woolf* v. *Pemberton*, 6 Ch. D. 19; *Smart* v. *S.*, [1892] A. C. 425; *Ex p. Hopkins*, 3 P. W. 152, 154; *Wellesley* v. *Beaufort*, 2 Russ. 21; *De Manneville* v. *De M.*, 10 V. 52, 62; *Thomasset* v. *T.*, [1894] P., at p. 298.

education and religious training of his child (*m*), and the child had to be brought up in the father's religion (*n*), except where the welfare of the infant required the rule to be disregarded, as where the infant was of sufficient age to have received and formed other religious impressions (*o*). A father could not release this right (*p*) nor bind himself to exercise it in a particular way (*q*). As against their mother he could place the children with another person (*r*).

Where a person confers a benefit upon the father or upon the children for their maintenance, or otherwise, upon condition that the father gives up the guardianship of them, if he accepts the benefit himself or commits the care of his children to the guardian nominated by the stranger, he will not be allowed afterwards to prejudice their interests by asserting his legal right, either by interfering with their education or enforcing the delivery up to him of their persons (*s*). Although a father can (apart from statute (*t*)), before it is acted upon, rescind and abandon an agreement by which he has given up the custody of his child to a third person (*u*), yet if it could not be revoked without injuriously affecting the interests of the child the father has been restrained from exercising the rights which at law he undoubtedly retained (*x*). But the Court will not deprive a father of the custody of his children merely because a person makes an offer to maintain them, even although it might be for the benefit of the children that such offer be acceded to (*y*).

Rights of Mother.—The father's right at common law to the

(*m*) As to religion, see especially *Re McGrath*, [1893] 1 Ch., at p. 148; *Re Newton*, [1896] 1 Ch. 740; *Re Clarke*, 21 Ch. D. 817; *Re Montagu*, 28 Ch. D. 82; *Re Nevin*, [1891] 2 Ch. 299; *Re Scanlan*, 40 Ch. D. 200; *Re White*, 9 T. L. R. 575; *Re Agar-Ellis*, 10 Ch. D. 49; 24 Ch. D. 317, C. A.; *Ward* v. *Laverty*, [1925] A. C. 101.

(*n*) *Talbot* v. *Shrewsbury*, 4 My. & C. 672; *Re North*, 8 L. T. 309; *Hawksworth* v. *H.*, L. R. 6 Ch., at p. 542; *Re Montagu*, 28 Ch. D. 82; *F.* v. *F.*, [1902] 1 Ch. 688; *Re Story*, [1916] 2 Ir. R. 328.

(*o*) *Re McGrath*, *Re Newton*, *supra*; *Re Besant*, 11 Ch. D., at p. 519; *F.* v. *F.*, *supra*; *Re Grey*, [1902] 2 Ir. R. 684; *Ward* v. *Laverty*, [1925] A. C. 101.

(*p*) *Andrews* v. *Salt*, L. R. 8 Ch. 636; *R.* v. *Barnardo*, 23 Q. B. D., at p. 310.

(*q*) *Ibid.*, and *Re Meades*, Ir. R. 5 Eq. 98.

(*r*) *Ex p. M'Clellan*, 1 Dowl. 81; *Ex p. Glover*, 4 Dowl. 291; *Ex p. Skinner*, 9 Moore, 278.

(*s*) *Colston* v. *Morris*, Jac. 257 (n.); *Potts* v. *Norton*, 2 P. W. 110 (n.); *Blake* v. *Leigh*, Amb. 306; *Powel* v. *Cleaver*, 2 Bro. Ch. 499; see also *Lyons* v. *Blenkin*, Jac. 245; *Andrews* v. *Salt*, L. R. 8 Ch. 622; *Faquani* v. *Selwyn*, Jac. 268 (n.); Simpson (4th ed.), p. 108.

(*t*) See *infra*, p. 463.

(*u*) *Hill* v. *Gomme*, 1 B. 540; *R.* v. *Barnardo*, 23 Q. B. D., at p. 310.

(*x*) *R.* v. *Smith*, 22 L. J. Q. B. 116; Simpson, p. 110.

(*y*) *Anon.*, Jac. 264; *Re Fynn*, 2 De G. & Sm. 457; *Clavering* v. *Ellison*, 3 Dr. 451.

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control and custody of his legitimate children, subject to the paramount consideration of their welfare (*z*), was as against the mother, absolute (*a*). He alone had the right to appoint testamentary guardians, and if he exercised this power the mother had no right to interfere with them (*b*); but if no such guardian were appointed by the father, then the mother became guardian by nature and nurture (*c*).

In the case of an illegitimate child, the mother has a *prima facie* right to its custody up to the age of fourteen in preference to the reputed father, or any other person (*d*).

3. Wards of Court.

1. *Generally.*—The term "ward of Court" is used to express either that a person is under the care of a guardian appointed by the Court, or that an infant is under the care of the Court of Chancery by reason of such infant being either actually a party to an action in which the property of the infant is being administered, or being in the position of a party (*e*).

An order made on summons or petition for a guardian (*f*); or for maintenance (*g*); or payment into Court of the fund of an infant under the Trustee Act (*h*); or money paid to the separate account of an infant in an administration action to which the infant was not a party, will make the infant a ward of Court (*i*). But the jurisdiction exists from the fact that the infant is a British subject, and not from the fact of there being property under control of the Court (*k*).

But payment in of an infant's legacy under the Legacy Duty

(*z*) *Thomasset* v. *T.*, [1894] P., at p. 300

(*a*) *Ex p. Skinner*, 9 Moore, 278; *Ex p. Bartlett*, 2 Coll. 661; *Re Thomas*, 22 L. J. Ch. 1075; Simpson (4th ed.), p. 100.

(*b*) *Reynolds* v. *Teynham*, 4 Bro. P. C. 302.

(*c*) *Villareal* v. *Mellish*, 2 Swans. 533; *Roach* v. *Garvan*, 1 Ves. Sen. 158; *R.* v. *Clarke*, 7 Ell. & Bl. 186; *Re Moore*, 11 Ir. C. L. 1; and see *Re D'Arcys*, *ibid.*, p. 298.

(*d*) *Re Ullee*, 53 L. T. 711; 54 L. T. 286; *Barnardo* v. *McHugh*, [1891] A. C. 388; *Re White*, 10 L. T. 349; *R.* v. *Nash*, 10 Q. B. D. 454; *Humphrys* v. *Polak*, [1901] 2 K. B. 385; *Re Connor*, [1919] 1 Ir. R. 361.

(*e*) *Stuart* v. *Marquis of Bute*, 9 H. L. C. 440; *Brown* v. *Collins*, 25 Ch. D. 60; *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356; *Re Leigh*, 40 Ch. D. 290.

(*f*) *Stuart* v. *Marquis of Bute*, 9 H. L. C. 440.

(*g*) *Re Graham*, 10 Eq. 530.

(*h*) *Re Benand*, 16 W. R. 538.

(*i*) *De Pereda* v. *De Mancha*, 19 Ch. D. 451, but see *Brown* v. *Collins*, 25 Ch. D., at p. 62.

(*k*) *Brown* v. *Collins*, *supra*; *Re McGrath*, [1893] 1 Ch. 143.

Act (*l*), or of purchase-money under the Lands Clauses Act, belonging to an infant (*m*), or an order approving a settlement under the Infants Settlements Act (*n*), does not constitute the infant a ward of Court (*l*), nor does an order under the Divorce Act, 1857, s. 35 (*o*).

2. *Marriage of Infants, etc.*—A male infant may contract marriage at fourteen, a female at twelve (*p*).—Under the Marriage Acts (*q*), the consent to the marriage of an infant must be given by the father, or if he be dead, by the guardians or one of them, and if there be none, by the mother if unmarried, and if not by the guardians appointed by the Court of Chancery or one of them; and such consent is required for the marriage of such a party so under age, unless there be no person authorised to give such consent (*r*). But if the required consent is not obtained, this does not make the marriage invalid, the provisions of the statute being directory merely and not constituting a condition precedent (*s*). Penalties are incurred, however, if a false oath is made in order to procure the solemnisation of a marriage (*t*).

Although the infant has no property, a guardian for the purpose of giving consent may be appointed by the Court: as where the father and mother are dead and there is no guardian (*u*), or if the father, guardian, or mother be *non compos* or beyond seas, or unreasonably refuse to consent to the marriage (*x*). When a marriage takes place, the law presumes that it was with due consent till the contrary appear (*y*).

In the case of *wards of Court*, even when they have parents living, or guardians, it is necessary to apply to the Court for leave for them to marry, which will only be granted upon its appearing that the marriage is suitable as to age and rank, and that the settlement proposed is proper (*z*). The Court will prevent a

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(*l*) *Re Hillary*, 2 Dr. & Sm. 461.

(*m*) *Re Wilts, etc., Ry. Co.*, 2 Dr. & Sm. 552.

(*n*) *Re Strong*, 26 L. J. Ch. 64. (*o*) *Hyde* v. *H.*, 13 P. D. 166.

(*p*) Simpson (4th ed.), p. 65.

(*q*) 4 Geo. 4, c. 76, and 6 & 7 Will. 4, c. 85; Simpson, p. 93.

(*r*) 4 Geo. 4, c. 76, s. 16.

(*s*) *R.* v. *Birmingham*, 8 B. & C. 29; and see *R.* v. *Clark*, 2 Cox, Cr. C. 183; Simpson, p. 94.

(*t*) See 4 Geo. 4, c. 76, ss. 25, 24; 19 & 20 Vict. c. 119, s. 19.

(*u*) *Re Woolscombe*, 1 Madd. 213; *Ex p. Becher*, 1 Bro. Ch. 556.

(*x*) 4 Geo. 4, c. 76, s. 17.

(*y*) *Balfour* v. *Carpenter*, 1 Phill. Ecc. R 221.

(*z*) *Smith* v. *S.*, 3 Atk. 305; *The Earl of Plymouth* v. *Lewis*, Dick. 801; *Wellesley* v. *The Duke of Beaufort*, 2 Russ. 29; Simpson (4th ed.), pp. 176—180.

clandestine marriage, by ordering that the ward shall not be married without leave of the Court, and that the person desirous of marrying the ward shall not have access, by letter or otherwise (*a*). It will likewise restrain the guardian or father from allowing the marriage to take place (*b*). Although a ward of Court marry without the leave of the Court, the marriage is not thereby made invalid (*c*).

If the Court considers the proposed marriage unsuitable, it makes no difference that the guardian has given his consent (*d*), or *semble* the father either (*e*). It is the duty of a guardian to prevent an unfitting marriage (*f*), and if he connives at such a marriage the Court will commit the ward to the care of others (*g*).

By the Infants Settlements Act, 1855 (*h*), it was provided (section 1) that it should be lawful for every infant "upon or in contemplation of his or her marriage," with the sanction of the Court of Chancery, to make a binding settlement, or contract for a settlement of his or her property, but this enactment does not extend to powers of which it is expressly declared that they shall not be exercised by an infant (*i*). A ward of Court cannot be compelled to make a marriage settlement of his property (*k*). The death of an infant tenant in tail under twenty-one avoids any appointment or disentailing assurance executed under the Act (*l*). The sanction of the Court to any settlement or contract for a settlement may be given upon an application in chambers by the infant or guardian (*m*); and if there be no guardian, the Court may require one to be appointed or not as it shall think fit; and also may require any persons interested, or appearing to be

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(*a*) Seton (7th ed.), p. 1006; *Pearce* v. *Crutchfield*, 14 V. 206; *Smith* v. *S.*, 3 Atk. 304; *Goodall* v. *Harris*, 2 P. W. 561; *Warter* v. *Yorke*, 19 V. 451; *Dawson* v. *Thompson*, 12 L. T. 178.

(*b*) *Lord Raymond's Case*, Cas. t. Talbot, 58.

(*c*) Simpson (4th ed.), p. 176.

(*d*) *Gordon* v. *Irwin*, 4 Bro. P. C. 355.

(*e*) *Per* Eldon, C., *Wellesley* v. *Beaufort*, 2 Russ., at p. 29.

(*f*) *Barker* v. *Taylor*, 1 C. & P. 101.

(*g*) *Tombs* v. *Elers*, Dick. 88; *Shipbrook* v. *Hinchinbrook*, Dick. 547; *Foster* v. *Denny*, 2 Ch. Ca. 237; *Roach* v. *Garvan*, 1 Ves. Sen. 157; *Smith* v. *S.*, 3 Atk. 307.

(*h*) 18 & 19 Vict. c. 43, extended to Ireland by 23 & 24 Vict. c. 83; see *Moore* v. *Johnson*, [1891] 3 Ch. 48.

(*i*) *Re Dalton*, 25 L. J. Ch. 751; *Re Catherine Strong*, 26 L. J. Ch. 64.

(*k*) *Re Leigh*, 40 Ch. D. 290; *Seaton* v. *S.*, 13 A. C. 61.

(*l*) Section 2; *Scott* v. *Hanbury*, [1891] 1 Ch. 298; see *Re Armit*, 5 Ir. R. Eq. 352.

(*m*) R. S. C., 1883, Order 55, r. 2 (10).

interested, to be served with notice of such application (section 3); but the Act is not applicable to any male infant under the age of twenty years, or to any female infant under the age of seventeen years (section 4).

It seems doubtful whether the Act applies, where the infant at the date of the marriage is under twenty in the case of the husband, or is under seventeen in the case of the wife (*n*); although in one case (*o*), where an infant ward was under seventeen at the date of the marriage, a settlement of her property after she attained that age was sanctioned by Chitty, J.

It will be observed that in order to be a settlement within the Act, it must be executed "upon or in contemplation of his or her marriage"; but it has been held that a settlement may be executed "upon" the marriage within the meaning of the Act, although post-nuptial (*p*). But it would seem doubtful whether a settlement can be said to be made "upon" the marriage, if made a considerable time afterwards (*q*).

It is important to bear in mind that the Infants Settlements Act is an enabling statute, empowering an infant to make a valid settlement "of his or her own property"; it does not authorise the Court to apply compulsion (*r*). In *Re Leigh* (*s*), R. C. L., a male ward of Court, having married without leave, Kay, J., upon the application of the infant's mother and testamentary guardian, directed a settlement to be executed; and this was done. On attaining twenty-one, R. C. L. commenced an action to set aside the settlement, and also gave notice of appeal from the order directing a settlement to be executed. In an affidavit in support the plaintiff stated that he would not have executed the settlement had it not been for fear of the consequences of disobeying the order. The order of Kay, J., was discharged by the Court of Appeal, upon the ground that it had been made without jurisdiction.

For orders on marriages and settlement of infants' property, see Seton (7th ed.), 1004 *et seq.*

The ward of Court (*t*) marrying without leave, and the person

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(*n*) *Re Leigh*, 40 Ch. D. 290, 293, 297.

(*o*) *Re Phillips*, 34 Ch. D. 467.

(*p*) *Re Sampson and Wall* (*infants*), 25 Ch. D. 482; *Re Phillips*, *supra*; *Re A. B.* (*an infant*), [1914] W. N. 140.

(*q*) See *Re Leigh*, 40 Ch. D. 290, 295.

(*r*) *Seaton* v. *S.*, 13 A. C. 61, 68; *Re Leigh*, *supra*; and see *Buckmaster* v. *B.*, 35 Ch. D. 21.

(*s*) 40 Ch. D. 290.

(*t*) *Re H's Settlement*, [1909] 2 Ch. 260, applying *dictum* of Cotton, L.J., in *Re Leigh*, 40 Ch. D. 294; Seton (7th ed.), p. 1008.

who, although an infant (*u*), marries him or her, and also those who contrive or assist at the marriage as abettors, including the clergyman, are guilty of a contempt of Court, and may be committed to close confinement in prison (*x*); and if they be peers or peeresses a sequestration will be ordered against them, as was the case against the Countess of Shaftsbury in the principal case, and proceedings have been stayed in a suit by a person who has married a ward of the Court and would not appear (*y*); and the contempt is equally great, although the father of the ward be alive (*z*), and whether the marriage be valid or invalid (*a*). "I do not admit," says Lord Eldon, "that, as there is no marriage, there is no contempt. The endeavour to marry is a contempt" (*b*).

If it is doubtful whether a marriage is valid or not, an inquiry upon that question will be directed, and all intercourse will in the meantime be restrained, and if it be found that the marriage of a ward is invalid, a valid marriage will be ordered (*c*).

In *Warter* v. *Yorke* (*d*), where the marriage of a male ward of Court, aged seventeen, had been celebrated, the parties having been married under false names, and the infant having falsely stated to the clergyman that he was twenty-one, Lord Eldon, upon the Master's report, notwithstanding that the woman whom the infant had married was pregnant, pronounced an order that a suit should be instituted on behalf of the infant in the Ecclesiastical Court, for nullity of the marriage, at the expense of the infant's estate, and the parties to the transaction were to be restrained from all intercourse, by correspondence, or otherwise, with the infant.

It seems that, although the parties contriving or assisting at a marriage are not aware that the infant is a ward of the Court, their ignorance, although it may be urged in mitigation of the offence (*e*),

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(*u*) *Edes* v. *Brereton*, West., Cas. t. Hardw. 348.

(*x*) *Herbert's Case*, 3 P. W. 116; *More* v. *M.*, 2 Atk. 157; *Butler* v. *Freeman*, Amb. 301; *Priestley* v. *Lamb*, 6 V. 421; *Millet* v. *Rowse*, 7 V. 419; *Baseley* v. *B.*, 4 Cl. & Fin. 378; *Wortham* v. *Pemberton*, 1 De G. & Sm. 644; *Martin* v. *Foster*, 7 De G. M. & G. 98; *Gynn* v. *Gilbard*, 1 Dr. & Sm. 356; *Re Tweedale's Settlement*, Johns, 109, 111; *Re Sampson and Wall*, 25 Ch. D. 482.

(*y*) *Brummell* v. *McPherson*, 7 V. 237; *Re Strong*, 26 L. J. Ch. 64.

(*z*) *Butler* v. *Freeman*, Amb. 301.

(*a*) *Salles* v. *Savignon*, 6 V. 572; *Bathurst* v. *Murray*, 8 V. 74; *Re Walker*, L. & G. t. Sugd. 299.

(*b*) *Warter* v. *Yorke*, 19 V. 453.

(*c*) *Bathurst* v. *Murray*, 8 V. 74; *Re Walker*, L. & G. t. Sugd. 299; *Re Murray*, 3 Dr. & War. 83; *Re Leigh*, 40 Ch. D., at p. 291; Seton (7th ed.), p. 1010.

(*d*) 19 V. 451.

(*e*) *More* v. *M.*, 2 Atk. 157.

will not be sufficient to acquit them of contempt of Court (*f*). In *Salles* v. *Savignon* (*g*), although the bill, the object of which was to make the lady a ward of the Court, was only filed on the day of her marriage, Lord Eldon held, that the marriage in fact was sufficient to ground a contempt of Court.

The Court has restrained proceedings taken in the Ecclesiastical Court against the ward or his guardian for alimony and restitution of conjugal rights by a person who married the ward in contempt of the Court (*h*).

It would seem that privilege of Parliament will not shield a person from being committed for contempt of Court (*i*). Prosecutions for conspiracy or perjury for making a false declaration as to age or consent may also be directed (*k*).

Punishment for the offence was not the only object of the commitment, as it was frequently made use of by the Court as the means of compelling the husband to make a proper settlement (*l*); and an inquiry might be directed as to whether the marriage was valid, what was the fortune of the infant ward, and what would be a proper settlement (*m*); and where there were *mitigating* circumstances, the husband, upon petition, undertaking to make a settlement approved of by the Court, might obtain his discharge (*n*). But in a flagrant case, he would not be discharged, upon his offering to execute a proper settlement, until the Court considered him sufficiently punished (*o*); nor, if the Court had ordered that he should be indicted for a conspiracy in procuring the marriage (*p*); at any rate, until he had either been acquitted, or upon being found guilty, had suffered punishment (*q*); and in general the husband in such cases would not be discharged until a certificate that the marriage was valid had been produced, and a proper settlement had been executed, and costs paid by him (*r*).

(*f*) *Mr. Herbert's Case*, 3 P. W. 116. *King* v. *Harwood*, 2 Lev. 32; 1 Vent. 178; *Nicholson* v. *Squire*, 16 V. 259; *Martin* v. *Foster*, 7 De G. M. & G. 98.

(*g*) 6 V. 572. (*h*) *Hill* v. *Turner*, 1 Atk. 515.

(*i*) *Wellesley* v. *Beaufort*, 2 Russ. & My. 639; *Ex p. Mitchell*, 2 Atk. 172; *Re Armstrong*, [1892] 1 Q. B., at p. 328.

(*k*) *Ball* v. *Coutts*, 1 V. & B. 292; *Wade* v. *Broughton*, 3 V. & B. 172; *Millet* v. *Rowse*, 7 V. 419; *Cox* v. *Bennett*, 22 W. R. 819.

(*l*) *Ball* v. *Coutts*, 1 V. & B. 300.

(*m*) See *Buckmaster* v. *B.*, 35 Ch. D., at p. 22.

(*n*) *Stevens* v. *Savage*, 1 V. 154; *Stackpole* v. *Beaumont*, 3 V. 89; Seton (7th ed.), p. 1011.

(*o*) *Bathurst* v. *Murray*, 8 V. 79; *Baseley* v. *B.*, 4 Cl. & Fin. 378.

(*p*) *Priestley* v. *Lamb*, 6 V. 424. (*q*) *Millet* v. *Rowse*, 7 V. 419.

(*r*) *Field* v. *Brown*, 17 B. 146; *Stevens* v. *Savage*, 1 V. 154; *Millet* v. *Rowse*, 7 V. 419; *Cox* v. *Bennett*, 22 W. R. 819; Seton (7th ed.), p. 1012.

It will be borne in mind that the settlement which the Court was able to compel a husband, who was in contempt, to execute, was a settlement of the extensive rights which formerly the husband by the marriage acquired in his wife's possessions. There appears to be no jurisdiction to compel a party in contempt to settle any property of his own. Under the present law the husband does not acquire, by the marriage, any indefeasible rights in his wife's property; and, accordingly, the power of the Court to protect its ward by compelling a husband in contempt to execute a proper settlement has become to a large extent obsolete.

The power of the Court over its ward expires upon the ward attaining twenty-one. In *Bolton* v. *B.* (*s*), an intending husband obtained the leave of the Court to pay his addresses to a ward of Court and undertook to abide by any directions of the Court. Immediately after coming of age (the parties having arranged to get married) the lady executed a settlement which gave a joint power of appointment to her and her intended husband in priority to the other trusts. It was held that having attained twenty-one, the Court had no power to interfere with the lady's proposed marriage or to control the settlement of her property, and that the undertaking given by the husband to the Court was only intended to operate whilst the lady continued to be under the jurisdiction of the Court.

Settlement on Marriage of a Ward of Court.—Where the marriage takes place *by the leave of the Court*, a settlement will be directed to be made.

It is difficult to lay down any rule upon the subject, as so much depends upon the circumstances of the parties, and, as Turner, L.J., said in *Martin* v. *Foster* (*t*), "the Court will give its sanction to any arrangement such as a prudent father would approve of." As a rule the husband would take the first life interest in his own property, and the wife the first life interest in hers to her separate use, without power of anticipation. Then provision would be made for the issue of the marriage, and, in default of issue, the husband's property is limited to himself absolutely, and the property of the wife, if she survive her husband, to her absolutely, but if she die in his lifetime, according as she shall appoint by will, and in default of appointment to her statutory next-of-kin. It is now general to give the wife a power of appointment whether she survive the

(*s*) [1891] 3 Ch. 270; *White* v. *Herrick*, 4 Ch. 345.
(*t*) 7 De G. M. & G. 102. See *infra*, pp. 444—5.

husband or not (*u*). If she be illegitimate and so have no next-of-kin, the ultimate limitation will be to her absolutely (*x*). Provision should also be made for the children of a second marriage (*y*).

Where the marriage takes place in contempt of the Court and the contempt is gross, the settlement will be framed in such a manner as to exclude the husband from all interest, and the rule will only be departed from in cases where it could be clearly shown that the departure would be for the benefit of the lady (*z*); but the wife will be given power, in default of issue, to appoint in the husband's favour by will. If the wife be the offending party she cannot in the same manner be excluded from the husband's property, as he is bound to support her (*a*); and the Court will not appoint trustees of the marriage settlement persons who are on unpleasant terms with the wife (*b*).

When the contempt has not been of an aggravated character, as for instance where the husband was ignorant at the time of the marriage that his wife was a ward of the Court, and there are "alleviating circumstances" attending the contempt, the settlement will be more favourable to the husband (*c*). A life interest in part of the income of the wife may be given to him during the coverture (*d*), and the wife should generally have power to appoint to him by will (*e*). In *Martin* v. *Foster* (*f*), a female ward of Court married without the Court's consent: the husband stated that he did not know she was a ward of Court. Upon the lady attaining twenty-one, she and her husband petitioned the Court for payment out of funds in Court (being about £2,500 stock and £690 cash) to which she was absolutely entitled. The petition asked that £1,000 of the funds might be paid to the

(*u*) *Ex p. Smith*, 22 W. R. 294; *Smith* v. *Iliffe*, 20 Eq. 666.

(*x*) *Scott* v. *Hanbury*, [1891] 1 Ch. 299.

(*y*) *Rudge* v. *Winnall*, 11 B. 98; *Long* v. *L.*, 2 S. & S. 124.

(*z*) *Wade* v. *Hopkinson*, 19 B. 613, 619; *Hodgens* v. *H.*, 4 Cl. & Fin. 323; *Field* v. *Brown*, 19 B. 176; *Field* v. *Moore*, 7 De G. M. & G. 691; *Birkett* v. *Hibbert*, 3 My. & K. 227; *sed vide Martin* v. *Foster*, 7 De G. M. & G. 98; Simpson (4th ed.), p. 185.

(*a*) *Re Murray*, 3 Dr. & War. 83; *Re Sampson and Wall*, 25 Ch. D. 482; Simpson, p. 185.

(*b*) *Re Sampson and Wall*, *supra*.

(*c*) *Richardson* v. *Merrifield*, 4 De G. & Sm. 161; *Wilkinson* v. *Joughin*, *infra*.

(*d*) *Bathurst* v. *Murray*, 8 V. 74.

(*e*) *Millet* v. *Rowse*, 7 V. 419; *Wilkinson* v. *Joughin*, 41 L. J. Ch. 234.

(*f*) 7 De G. M. & G. 98. This case stood over, and eventually the husband insured his life, the policy being brought into the settlement. The greater part of the funds in Court were thereupon paid out to him, the residue being paid to the trustees of the settlement.

trustees of a settlement which had been agreed upon and already prepared, and that the residue might be paid to the husband. It was held that the contempt committed gave the Court jurisdiction to withhold payment during the joint lives of husband and wife until a settlement approved by the Court should be executed. "I do not mean to say now," observed Knight Bruce, L.J., "that a settlement is to be forced upon the gentleman and lady, but . . . *without a settlement discreet and proper under the circumstances being made, not one shilling of the capital of the fund shall, during the joint lives, be touched with my consent.*" This case was decided long before the Married Women's Property Acts; but it seems clear that if the fund had belonged to the wife absolutely for her separate use, without restraint upon anticipation, the Court would have had no jurisdiction to withhold payment out according to her direction (*g*).

It may be here mentioned that when a proper case is made out, the Legislature has annulled marriages where infants have by fraud, misrepresentation, or violence been induced to go through the ceremony of marriage. See cases collected in the report of the proceedings in *Field's Marriage, annulling Bill* (*h*).

The sanction of the Court given to a settlement made by an infant ward under the Infants Settlements Act (*i*), removes only objections to the validity of the settlement arising from the infancy of the settlor. The statute deals with the incapacity arising from infancy alone (*k*).

4. Testamentary Guardians.

Before the passing of the Guardianship of Infants Act, 1886, the husband had the exclusive right of appointing a testamentary guardian; the wife now has a co-ordinate right (*l*). The Act of 12 Car. 2, c. 24, empowered the father of any child under the age of one-and-twenty years, and not married at the time of the father's death, by deed executed in his lifetime, or by will, to dispose of the custody and tuition of such child or children, whilst under twenty-one.

Such testamentary guardianship was a prolongation of the

(*g*) See *Buckmaster* v. *B.*, 35 Ch. D. 21; *Re Leigh*, 40 Ch. D. 290.
(*h*) 2 H. L. C. 48.
(*i*) 18 & 19 Vict. c. 43.
(*k*) *Seaton* v. *S.*, 13 A. C., at p. 69.
(*l*) For the alterations made by successive statutes, see *infra*, pp. 460—463.

paternal authority (*m*); but the Court would interfere in cases in which it would not interfere with the discretion of a father (*n*).

Although a father has no right, under 12 Car. 2, c. 24, to nominate guardians for his *natural* children, the Court would generally appoint those whom he has selected (*o*).

If an unmarried woman be appointed, and afterwards marries, the Court, if the infant be a ward of Court, may inquire what ought to be done as to continuing the guardian in that office (*p*).

The office of testamentary guardian, where there are more than one, goes to the survivor (see the principal case), and section 8 of 12 Car. 2, c. 24, sanctions a father in giving authority to a surviving guardian to nominate a person in the place of one who has died (*q*).

A guardianship, however, as is laid down in the principal case, is not assignable (*r*).

Testamentary guardians, before acting, may disclaim (*s*), but if they have once acted, they cannot renounce (*t*), although where there is no charge against them, they may be removed with their consent (*u*), and the Court may appoint other persons as *quasi* guardians to have charge of the infant until further order (*x*).

A testamentary guardian will not be disabled from exercising the office from having been a witness to the execution of the deed by which he was appointed (*y*).

A testamentary guardian of minor children is entitled to a grant of administration for their use and benefit, preferably to a guardian elected by the children, and a grant made to the latter will be revoked, and a fresh grant made to the testamentary guardian (*z*).

A testamentary guardian is a trustee, and the Statute of

(*m*) See the principal case, and *Wellesley* v. *W.*, 2 Bli. (N.S.), at p. 145; Simpson, Infants (4th ed.), p. 154.

(*n*) *Per* Cotton, L.J., in *Re Agar-Ellis*, 24 Ch. D., at p. 332.

(*o*) *Peckham* v. *P.*, 2 Cox, 46; *Ward* v. *St. Paul*, 2 Bro. Ch. 583; but see the Guardianship of Infants Act, 1886, *infra*.

(*p*) *Jones* v. *Powell*, 9 B. 345; Simpson (4th ed.), p. 155.

(*q*) *Re Parnell*, L. R. 2 P. & D. 379.

(*r*) See also *Mellish* v. *De Costa*, 2 Atk. 14; *Reynolds* v. *Tenham*, 9 Mod 40; *Villareal* v. *Mellish*, 2 Swans. 536.

(*s*) *O'Keeffe* v. *Casey*, 1 Sch. & L. 106.

(*t*) *Spencer* v. *Chesterfield*, Amb. 146.

(*u*) *Re McCullochs*, Dr. 276.

(*x*) *Spencer* v. *Chesterfield*, Amb. 146.

(*y*) *Morgan* v. *Hatchell*, 19 B. 86.

(*z*) *Re Morris*, 2 Sw. & Tr. 360.

Limitations is therefore inapplicable to accounts as between him and his wards (*a*). They may, however, lose all right to make any claim against him or his estate by acquiescence (*b*).

The guardianship may be appointed to last until twenty-one, or for any less time (*c*). If no period is mentioned for its duration, it will last during minority (*d*). It is not determined, as was decided in the principal case, by the marriage of a male infant. In *Mendes* v. *M.* (*e*), Lord Hardwicke is reported to have said that the marriage of a female ward would determine the guardianship, but this *dictum* does not appear in the case as reported in 3 Atk. 624, and in another case the same Judge held that the guardianship of a person appointed by the Court of Chancery did not determine by marriage of a female ward (*f*).

5. Jurisdiction of Court.

Over Father.—" The law of England has recognised the natural rights of a father, not as guardian of his children, but as the father, because he is the father. * * The father has greater rights than the testamentary or any other guardian. These are sacred rights because the duties of a father are sacred duties " (*g*). " The Court must not be tempted to interfere with the natural order and course of family life, the very basis of which is the authority of the father, except it be in those special cases in which the State is called upon, for reasons of urgency, to set aside the parental authority, and to intervene for itself " (*h*). Having regard to the statutory alterations mentioned later, the special position which these passages assign to the father alone must be treated as now belonging to the father and mother equally. As parents are entrusted with the custody of the persons and the education of their children, upon the presumption that the children will be properly taken care of, will be brought up with due education, and will be treated with kindness and affection, when this presumption is removed by the conduct of the parents, the Court will

(*a*) *Mathew* v. *Brise*, 14 B. 341; Hewitt on Limitations, p. 171.
(*b*) *Sleeman* v. *Wilson*, 13 Eq. 36.
(*c*) Vaugh. 184; Simpson, Infants (4th ed.), p. 153.
(*d*) *Mendes* v. *M.*, 1 Ves. Sen. 91; but see Vaugh. 184, 185.
(*e*) 1 Ves. Sen. 91.
(*f*) *Roach* v. *Garvan*, 1 Ves. Sen. 160; *Jones* v. *Powell*, 9 B. 345.
(*g*) *Per* Brett, M.R., *Re Agar-Ellis*, 24 Ch. D., at pp. 327, 329.
(*h*) *Per* Bowen, L.J., in *Re Agar-Ellis*, 24 Ch. D., at p. 335. Cf. *Smart* v. *S.*, [1892] A. C. 425; *Re Sandbrook*, [1912] 2 Ch. 471, 476.

interfere, and will appoint a suitable person as guardian (*i*), or to act as guardian (*k*).

It is impossible to state "in other than elastic terms the grounds on which the Court should think fit to interfere" (*l*). "The course of legislation shows distinctly a growing sense that the power formerly accorded by law to fathers of families was excessive, and that the welfare of the children, now recognised as the paramount consideration (*m*), required that it should be cut down" (*n*).

Where the character of the father is good, although he may be poor and insolvent, his children will not be taken from him, for mere poverty is no ground for the interference of the Court (*o*); but where the father is insolvent, and his character is bad, and he has deserted his children, or is endangering their property, and neglecting their education, *a fortiori* if he is out of the jurisdiction, the Court will interfere (*p*).

In *Creuze* v. *Hunter* (*q*), a petition was presented stating the entangled state of Mr. Hunter's property, and that he was an outlaw, and resided abroad, and that his son, an infant, was entitled in remainder to a very considerable estate, as also to maintenance by the will of his grandfather, and praying that Mr. Hunter might be restrained from taking his son abroad, or improperly interfering with his education, which was then principally directed by his mother, who lived separate from her husband. Affidavits were filed on both sides, imputing very improper conduct to both father and mother. Thurlow, C., ordered that the father should be restrained from interfering with the management of his child without the consent of Lord Hawke and Mr. Adams, whom both parties allowed to be proper persons for such a purpose, and observed, that he was of opinion that the Court had arms long enough to reach such a case, and prevent a parent from prejudicing the health or future prospects of the child;

(*i*) See Story, Eq. (3rd ed.), pp. 563, 564, and judgment of James, L.J., in *Re Agar-Ellis*, 10 Ch. D. 71, 72.

(*k*) *Ex p. Mountfort*, 15 V. 446, and cf. *Re Grey*, [1902] 2 Ir. R. 684.

(*l*) *Smart* v. *S.*, [1892] A. C., at p. 432.

(*m*) *R.* v. *Gyngall*, [1893] 2 Q. B. 232; *Re Newton*, [1896] 1 Ch. 740; *F.* v. *F.*, [1902] 1 Ch. 688; *Re Grey*, [1902] 2 Ir. R. 684.

(*n*) *Smart* v. *S.*, [1892] A. C., at p. 435.

(*o*) *Re Curtis*, 28 L. J. Ch. 463; Simpson (4th ed.), p. 108.

(*p*) See *Kiffin* v. *K.*, cited 1 P. W. 705; *Ex p. Mountfort*, 15 V. 445; *Wilcox* v. *Drake*, Dick. 631; *Re England*, 1 Russ. & M. 499; *Thomas* v. *Roberts*, 3 De G. & Sm. 758; and see *Re Cormicks*, 2 Ir. Eq. R. 264; Simpson, p. 110.

(*q*) 2 Cox, 242.

and that whenever a case was brought before him, he would act upon this opinion, and that he certainly would not allow the child to be sacrificed to the views of the father (*r*).

In *Wellesley* v. *Beaufort* (*s*), the habits of the father, whose children were taken from him, were profligate, and his language often profane, and he cohabited in his own house in open adultery with the wife of another man; and if a father be living in a state of habitual drunkenness (*t*), incapacitating himself from taking care of his children's education, especially if he poisons the minds of his children with blasphemy, the Court would take care that the children should not be under the control of a person so debased and so likely to injure them (*u*). Gross ill-treatment and cruelty by a father to his children will justify the Court in superseding his authority (*x*).

But acts on the part of a father which, although somewhat cruel, amount to little more than harshness or severity (*y*), although they may be such as may prevent his wife from living happily with him, provided they be not such as to contaminate the morals of his children (*z*), would not afford sufficient grounds for the Court to interfere with the father's power over his children; nor would the fact that he had *formerly* been given up to idleness, profligacy, and drunkenness (*a*).

The Court, apart from statute (*b*), had no jurisdiction to compel the father to allow the mother to have access to their child, and so refused to deprive a father, though living in adultery, of the custody of his child, where he did not bring the child in contact with the woman with whom he was so living; or to order him to permit the mother to have access to the child, where no misconduct on his part was shown with reference to the management and education of the child (*c*).

(*r*) *Ex p. Warner*, 4 Bro. Ch. 101; *Skinner* v. *Warner*, Dick. 779; Simpson (4th ed.), p. 111.

(*s*) 2 Russ. 1, affirmed H. of L. 2 Bligh (N.S.) 124.

(*t*) Cf. *Re Newton*, [1896] 1 Ch., at p. 753.

(*u*) See *Wellesley* v. *Beaufort*, 2 Russ. p. 30; *De Manneville* v. *De M.*, 10 V. 62; *Warde* v. *W.*, 2 Ph. 786.

(*x*) See *Whitfield* v. *Hales*, 12 V. 492; *Re Newton*, *supra;* and cf. the Children Act, 1908, ss. 12—28.

(*y*) See *Curtis* v. *C.*, 5 Jur. (N.S.) 1147, and cases there cited as to the rights of family life; approved by Bowen, L.J., *Re Agar-Ellis*, 24 Ch. D., at p. 337.

(*z*) *Re Spence*, 2 Ph. 252.

(*a*) *Re Halliday*, 17 Jur. 56.

(*b*) *See* infra, pp. 460—3.

(*c*) *Ball* v. *B.*, 2 Si. 35.

Eyre v. Countess of Shaftsbury.

Where children are taken from the custody of their father, access or communication with him will, if proper, be permitted (*d*); for into whatsoever hands the custody of the children might fall, it would be their duty to consult the interest and happiness of the children, by allowing filial affection and duty towards their father to operate to the utmost (*e*).

Over Testamentary Guardian.—The Court will much more readily interfere in the case of a testamentary guardian than with the authority or discretion of a father. In the latter case it does not interfere because of the great trust and faith it has in the natural affection of the father to perform his duties, and therefore gives him corresponding rights (*f*). The testamentary guardian stands in an entirely different position (*g*).

Such a guardian could not, it seems, prior to the Guardianship of Infants Act, 1886 (*h*), be actually removed, but he might be superseded to the extent of some one else being directed to act in his stead (*i*). But, as was decided in the principal case, the pecuniary interest which a testamentary guardian may have in the death of the ward will be no ground for superseding him (*k*). On the bankruptcy or insolvency of a testamentary guardian, a proper person will be appointed to have the care of the person (*l*) or to have the care of the maintenance and education (*m*) of the infant; and orders are frequently made, regulating the conduct of testamentary guardians and guardians appointed by the Court (*n*).

Reciprocity between English and Scotch Courts.—Scotch testamentary tutors are not testamentary guardians, according to the statute (*o*). In cases relating to the care of infants, the benefit of the infant being the foundation of the jurisdiction and the test of

(*d*) *Wellesley* v. *Beaufort*, 2 Russ. p. 43.

(*e*) *Per* Eldon, C., *ibid.*

(*f*) *Re Agar-Ellis*, 24 Ch. D. 328.

(*g*) *Ibid.*, p. 332; *Beaufort* v. *Berty*, 1 P. W. 704; *Talbot* v. *Shrewsbury*, 4 My. & Cr. 673.

(*h*) See *infra*, p. 460.

(*i*) *Foster* v. *Denny*, 2 Ch. Ca. 237; *Ingham* v. *Bickerdike*, 6 Mad. 275; Simpson (4th ed.), p. 262. But as to whether there was not power, even apart from statute, to remove a testamentary guardian, see the observations of the L. C. in *Beattie* v. *Johnstone*, 1 Ph. 17, 31.

(*k*) *Morgan* v. *Dillon*, 9 Mod. 135; *Dillon* v. *Lady Mount Cashel*, 4 Bro. P. C. 306, Toml. edit.; *Corbett* v. *Tottenham*, 1 Ball & B. 59.

(*l*) *Smith* v. *Bate*, Dick. 631.

(*m*) *Heysham* v. *H.*, 1 Cox, 179.

(*n*) *Roach* v. *Garvan*, 1 Ves. Sen. 160; *Spencer* v. *Chesterfield*, Amb. 146; *O'Keefe* v. *Casey*, 1 Sch. & L. 106; *Ex p. Ilchester*, 7 V. 381.

(*o*) *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42; *Scott* v. *Bentley*, 1 Kay & J. 281, 284; *Stuart* v. *Bute*, 9 H. L. C. 440.

its proper exercise, there ought on this subject to be a perfect reciprocity of action between the Courts of England and Scotland, although as to judicial jurisdiction the two countries may be to each other independent foreign countries (*p*).

Over Guardians appointed by the Court.—"Although the Court has power of interfering in certain cases with testamentary guardians, it proceeds on very different rules and principles from those which regulate its conduct when the discretion of appointing guardians devolves upon it in the first instance" (*q*). The Court never hesitated to remove a guardian appointed by itself.

In general, like the testamentary guardian, the guardian appointed by the Court will be entitled to the custody of the infant's person, but the Court, as in the principal case, will exercise its discretion either in ordering the ward to be delivered up to the guardian, or in permitting him to reside with the mother, or that she may have access to him (*r*).

The guardian will be allowed to regulate the mode and settle the place for the education of his ward, whose obedience will be enforced by the Court (*s*). Where there are joint guardians and they differ as to the mode of education, the Court will decide between them (*t*); and in the appointment of guardians by the Court, much weight will be given to the wishes of the deceased father (*u*), of which parol proof was received in *Anon.* (*x*), but rejected in *Storke* v. *S.* (*y*).

Although the father may have appointed a testamentary guardian, if he has by his will desired that some one else should have the custody of his children, his wishes as to the custody will be had regard to (*z*).

Where a female infant has arrived at years of discretion, the Court will consult her wishes as to which of her guardians she desires

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(*p*) *Stuart* v. *Bute*, *supra*.

(*q*) *Per* Lord Cottenham, *Beattie* v. *Johnstone*, 1 Ph. 17, 31; *Jones* v. *Powell*, 9 B. 345.

(*r*) *Ex p. the Earl of Ilchester*, 7 V. 380; *Wright* v. *Naylor*, 5 Madd. 77; *Talbot* v. *the Earl of Shrewsbury*, 4 My. & C. 672, 683.

(*s*) *Hall* v. *H.*, 3 Atk. 721; *Mitchel* v. *Duke of Manchester*, Dick. 149; *Tremain's Case*, 1 Stra. 168.

(*t*) *Duke of Beaufort* v. *Berty*, 1 P W. 702; and see *Stuart* v. *Marquis of Bute*, 9 H. L. C. 440.

(*u*) *Campbell* v. *Mackay*, 2 My. & C. 34.

(*x*) 2 Ves. Sen. 56.

(*y*) 3 P. W. 51.

(*z*) See *Knott* v. *Cottee*, 2 Ph. 192; *Duke of Beaufort* v. *Berty*, 1 P. W. 706; see also *Hartley* v. *Smith*, 10 W. R. 763.

to reside with (*a*), and it has even allowed her at her option to remain in the custody of a person who was not a guardian, in preference to the legal guardian (*b*). But in such a case the Court would order the person so chosen to have the custody to enter into recognisances not to allow her to marry save by leave of the Court (*c*).

In general, the Court will not allow its wards to be taken out of its jurisdiction, and the father or other guardian has been restrained from removing a ward to a foreign country (*d*). But the statement of Lord Eldon in *Mountstuart* v. *M.* (*e*) that the Court never makes an order for taking an infant out of the jurisdiction, certainly goes too far, and is inconsistent with the order he himself made in the case referred to below (*f*). There are many instances of wards of Court being allowed to reside with relatives abroad (*g*). Permission to go abroad for travel or to pay a visit is obtained more easily than formerly (*h*). In such cases the Court will usually take security for the ward's due return, and that the ward will be under proper control whilst abroad (*i*).

In *Re Callaghan* (*k*), it was held by the C. A. that leave may be given to take a ward out of the jurisdiction without a case of necessity being shown, if the Court is satisfied that it will be for the ward's benefit, and that there is sufficient security that future orders will be obeyed. In this case such security was taken by appointing an uncle of the ward, resident in this country, as guardian, jointly with the mother, who was going to live with the infant in Jamaica.

The clandestine removal of a ward of Court from the custody of the person with whom such ward is residing, under the authority of the Court, is a contempt of a *quasi*-criminal nature (*l*). Thus in *Wellesley* v. *Duke of Beaufort* (*m*), a member of the House of

(*a*) *Storke* v. *S.*, 3 P. W. 50.

(*b*) *Bridget Hide's Case*, 3 Salk. 178; and see *Anon.*, 2 Ves. Sen. 374.

(*c*) *Bridget Hide's Case*, 3 Salk. 178; and see *Re Lyons*, 22 L. T. 770.

(*d*) *De Manneville* v. *De M.*, 10 V. 52; *Shaftsbury* v. *Hannam*, Finch, 323; *Newport* v. *Moore*, Dick 166.

(*e*) 6 Ves. 363.

(*f*) *Anon.*, Jac. 265 n.

(*g*) Simpson (4th ed.), p. 111, note (*u*).

(*h*) *Dawson* v. *Jay*, 3 De G. M. & G. 764. But see the observations of Lord Cottenham in *Campbell* v. *Mackay*, 2 My. & Cr. 32, 33.

(*i*) *Jeffrys* v. *Vantesworstwarth*, Barn. Ch. R. 141, 144; *Re Medley*, 6 Ir. R. Eq. 339; Simpson, p. 111.

(*k*) 28 Ch. D. 186; *Re Montagu*, 28 Ch. D. 82.

(*l*) As to privilege, cf. *Re Gent*, 40 Ch. D. 190, 196; as to appeal, *O'Shea* v. *O'S.*, 15 P. D., at p. 62.

(*m*) 2 Russ. & My. 639.

Eyre v. Countess of Shaftsbury.

Commons who had carried off his infant daughter, a ward of the Court, from the house of the ladies under whose care she had been placed by the guardians appointed by the Court, and who, on being personally examined by the Court, admitted the fact, and refused to state the present residence of his daughter, was ordered to be committed to the Fleet, although he was not a party to the suit.

It is a contempt of the Court to remove an infant out of the jurisdiction, even when he has enlisted in the army, without the leave of the Court (*n*).

As it is obviously impossible for the Court of Chancery, with the number of wards which it has under its care, to be aware of their conduct, it requires the guardians, from time to time, to give general information of what is taking place. If, for instance, a ward of the Court goes out of the jurisdiction, or from extravagant habits gets into difficulties, it becomes the duty of the guardians at once to apply to the Court in Chambers for its assistance and directions (*o*).

A solicitor is bound to give to the Court any information which may lead to the discovery of the residence of a ward of the Court, whose residence is being concealed from the Court, although such information may have been communicated to him by his client in the course of his professional employment. Therefore, where the mother of wards of the Court had absconded with the wards, her solicitor was ordered to produce the envelopes of letters which he had received from her as her solicitor, with the object of discovering her residence from the postmarks (*p*).

The Court may order the guardian to attend at Chambers with the infant, or the infant to attend alone, or may order the Sergeant-at-arms to bring the infant before the Court (*q*). Where the mother is the sole guardian of an infant entitled to a large estate, the sum allowed the mother for the upkeep of establishment and education of the infant ought to be such sum as prudent guardians would allow to her "as mother." To decide what is a reasonable sum all the circumstances of each case must be considered; the governing consideration being what is for the infant's

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(*n*) *Rochford* v. *Hackman*, Kay, 308; *Harrison* v. *Goodall*, *ibid.*, 310.

(*o*) *Kay* v. *Johnson*, 21 B., at p. 538; Simpson (4th ed.), p. 175.

(*p*) *Ramsbotham* v. *Senior*, 8 Eq. 575; *Burton* v. *Earl of Darnley*, *ibid.* 576 (n.); and see *Rosenberg* v. *Lindo*, 48 L. T. 478.

(*q*) Seton (7th ed.), p. 1003; and see *G.* v. *L.*, [1891] 3 Ch. 126.

interest (*r*). Strict yearly accounts of the administration of the minor's property ought to be kept (*r*).

6. Custody.

Habeas Corpus.—Any person entitled to the legal (*s*) custody of a child may, subject as hereinafter appears, enforce such right by a writ of *habeas corpus* (*t*).

It is the universal law of England, that if any person alleges that another is under illegal control by anybody, that person may move before any Judge for a writ of *habeas corpus*, and thereupon the person, under whose supposed control or in whose custody the person is alleged to be confined, is brought before the Court (*u*). The Court will exercise this delicate jurisdiction according to its judicial discretion, considering what course is most for the welfare of the children and the family, and having regard to the opinions of the day, rather than to those of past times (*x*).

In proceedings under *habeas corpus*, the Court is enabled to regard something more than the strict rights of fathers and guardians, the dominant consideration being that upon which the Courts of Chancery have always acted—the welfare of the infant (*y*). In determining what is for the welfare of an infant, the Court will, if it be of *any reasonable age*, see the infant and ascertain its wishes (*z*). And probably a child who had attained such age

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(*r*) *Barnes* v. *Ross*, [1896] A. C. 625.

(*s*) *Re Harper*, [1895] 2 Ir. R. 571; as to what is legal custody, see *Re Agar-Ellis*, 24 Ch. D., at p. 331.

(*t*) See as to the older cases at law, *R.* v. *Greenhill*, 4 A. & E. 624; *Re Hakewill*, 12 C. B. 223; *R.* v. *Clarke*, 1 El. & Bl. 186; *R.* v. *Howes*, 3 El. & E. 332; *Re Turner*, 41 L. J. Q. B. 142; and as to more recent cases, *Re Agar-Ellis*, 24 Ch. D. 317; *R.* v. *Barnardo*, [1891] 1 Q. B. 194; [1891] A. C. 388; *Barnardo* v. *Ford*, [1892] A. C. 328; *Re Ethel Brown*, 13 Q. B. D. 614; *R.* v. *Gyngall*, [1893] 2 Q. B. 232; *Thomasset* v. *T.*, [1894] P. 300.

(*u*) See judgment of Brett, M.R., *Re Agar-Ellis*, 24 Ch. D., at p. 326; explained *R.* v. *Gyngall*, [1893] 2 Q. B. 232.

(*x*) See *Smart* v. *S.*, [1892] A. C., at pp. 435, 436; cf. *R.* v. *Gyngall*, *infra*; *Re Agar-Ellis*, *supra*, p. 336; *Ex p. Hopkins*, 3 P. W. 152; *R.* v. *Greenhill*, 4 A. & E., at p. 643; *Re Andrews*, L. R. 8 Q. B. 153; *Re Shanahan*, 20 L. T. 183; *Re Connor*, 16 Ir. C. L. 112; *Thomasset* v *T.*, [1894] P., at p. 298; *R.* v. *Wigand*, [1913] 2 K. B. 419.

(*y*) *Thomasset* v. *T.*, [1894] P., at p. 300; *Smart* v. *S.*, [1892] A. C. 425; *Re McGrath*, [1893] 1 Ch. 143; *R.* v. *Gyngall*, [1893] 2 Q. B., at pp. 243—248; *Re Grey*, [1902] 2 Ir. R. 684; *Re Story*, [1916] 2 Ir. R. 328; see the statutes cited infra, pp. 460—3.

(*z*) See *R.* v. *Gyngall*, [1893] 2 Q. B., at p. 251. In this case, the infant appears to have been thirteen or fourteen when first interviewed. She was interviewed first by Denman, J., in Chambers, and afterwards by Lord Coleridge, C.J., and Lopes, L.J., sitting as a Divisional Court. See also *Ward* v. *Laverty*, [1925] A. C. 107—109.

would not be ordered into the custody of either parent against its will (*a*).

On an application by a father to any division of the High Court to obtain the possession of his child by a writ of *habeas corpus*, no order will be made in his favour if there are reasons against his having the custody, which would heretofore have operated upon the Courts of equity in such a case (*b*). In *Ward* v. *Laverty* (*c*), the question was whether the custody of three infant children whose parents were dead should be entrusted to an aunt of the father or to the parents of the mother. The infants' parents were married in 1911, the husband being a Roman Catholic, and the wife (who had been a Presbyterian) being received into that Church at the time of her marriage. The children were baptised according to the rites of the Roman Catholic Church, and the eldest when old enough attended a Roman Catholic school. The marriage was not a happy one, the husband giving way to intemperance and on one occasion being convicted of an assault upon his wife. In June, 1920, they separated, the wife with the three children (all girls) thenceforth living with her parents who were Presbyterians. In October, 1920, the infants' father died, and the mother, about this time, again joined the Presbyterian Church. The eldest girl was taken away from the Roman Catholic school, and from that time attended a Protestant school. The mother died in 1923. The father by his will had expressed his wish that all the children should be brought up as Roman Catholics. After the mother's death in 1923 the father's aunt applied for a writ of *habeas corpus* with a view to obtaining the custody of the children and having them brought up as Roman Catholics. When the matter came before the King's Bench in Northern Ireland the infants were of the respective ages of eleven, six and four. The Judges of the King's Bench Court interviewed the eldest girl and were satisfied that she had decided convictions in favour of the Presbyterian Church. They accordingly refused the application, so far as regards the eldest girl, but they granted it as regards the two younger children. The Court of Appeal affirmed this order, so far as concerns the eldest child, but reversed it as

(*a*) *Per* Lindley, L.J., *Thomasset* v. *T.*, [1894] P., at pp. 302, 303. Cf. *Judkins* v. *J.*, [1897] P. 138 (C. A.).

(*b*) See *Re Goldsworthy*, 2 Q. B. D. 75; *Re Ethel Brown*, 13 Q. B. D. 615; *Smart* v. *S.*, [1892] A. C. 425; *R.* v. *Gyngall*, [1893] 2 Q. B. 232; *Re Story*, *supra*.

(*c*) [1925] A. C. 101.

regards the younger children, the Court being of opinion that the children should not be separated, and that all three children should continue to live with the grandparents and be brought up as Protestants. On appeal to the House of Lords, the order of the Court of Appeal was confirmed.

In the case of an illegitimate child, the Court will consider the wishes of the mother, unless prejudicial to the welfare of the child (*d*). An appeal lies to the Court of Appeal from an order of the Queen's Bench Division, directing the issue of a writ of *habeas corpus* to bring before the Court an infant in order to determine the custody and control of such infant (*e*).

Chancery Division, etc.—Independently of the writ of *habeas corpus*, the Court of Chancery has always exercised the power of the Crown as *parens patriæ* over infants, and its exercise of such jurisdiction has been much more extensive than that possessed by Courts of law under the writ; and the infants need not be wards of Court or have property (*f*).

In *Re Thain* (*g*), a father, whose wife had died in 1919, leaving one child, a girl a few months old, having no suitable home for the infant, left her with Mr. and Mrs. Jones (Mrs. Jones being his deceased wife's sister) who brought her up as one of their family. But the father contributed to the child's support and frequently visited her. In 1922 the father married again, but there had been no issue of such marriage. In 1925, the father having then a comfortable home, desired that his daughter should live with him. It was held that the father was entitled to the custody of his child, it not appearing that this would be adverse to the child's interests. "The rule laid down for guidance in the exercise of this jurisdiction," said Eve, J., "does not state that the welfare of the infant is to be the sole consideration, but the paramount consideration; it necessarily contemplates the existence of other conditions and amongst these the wishes of an unimpeachable parent undoubtedly

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(*d*) *Barnardo* v. *McHugh*, [1891] 1 Q. B. 194; [1891] A. C. 388; *Ex p. Emerson*, 11 T. L. R. 218; *Humphrys* v. *Polak*, [1901] 2 K. B. 385; *Re Gavagan*, [1922] 1 Ir. R. 148.

(*e*) *Barnardo* v. *McHugh*, *supra*; *Barnardo* v. *Ford*, [1892] A. C. 326; *Re Newton*, [1896] 1 Ch. 740; cf. *Cox's Case*, 15 A. C. 506; *Secretary of State for Home Affairs* v. *O'Brien*, [1923] A. C. 603; *Ward* v. *Laverty*, [1925] A. C. 101; *Re Thain*, [1926] Ch., at p. 677.

(*f*) *R.* v. *Gyngall*, [1893] 2 Q. B., at p. 248; *Re Newton*, *supra*; *Smart* v. *S.*, [1892] A. C., at pp. 435, 436; *Re McGrath*, [1892] 2 Ch., at p. 511; *Re Grey*, [1902] 2 Ir. R. 684; *Re Thain*, [1926] Ch. 676.

(*g*) [1926] Ch. 676; and see *Re O'Hara*, [1900] 2 Ir. R. 232, 240.

stand first" (*h*). "The welfare of the child," said Warrington, L.J., "is no doubt the first and paramount consideration, but it is only one among several other considerations, the most important of which is that the child should have the opportunity of winning the affection of its parent, and be brought for that purpose into intimate relation with the parent" (*i*). "Section 1 of the Guardianship of Infants Act, 1925," said Sargant, L.J., "does not affect what was and is the law, that the first and paramount consideration is the welfare of the child. It is very much for the child's welfare that she should be in the custody and living in the house of her father rather than with the aunt and uncle, however affectionate and kind they may be" (*k*).

In *Re McGrath* (*l*), a Roman Catholic tailor married a wife of the same faith. There were five children, all baptised Roman Catholics, aged respectively, at the hearing of the appeal, a boy sixteen, three girls fifteen, thirteen, and eleven, and a boy of six. The elder boy during his father's life was sent to an industrial Protestant home. The girls were educated principally at Roman Catholic schools. After the father's death the mother, who professed herself a Protestant and who was in very poor circumstances, appointed, under the Guardianship of Infants Act, 1886 (*m*), a Protestant lady who had befriended her as guardian of the girls and the youngest boy, and then died. The guardian placed the girls at a Protestant industrial home. A next friend of the infants took out a summons under the Act and the Custody of Children Act, 1891 (*infra*, p. 461), asking that the guardian appointed by the mother might be removed and other guardians appointed, and for directions as to the religious education of the infants. The evidence showed that the father had been absolutely indifferent in the matter of religion, and the eldest boy made an affidavit that he was and intended to remain a Protestant, and the eldest girl wished to remain where she was. North, J., dismissed the summons, being of opinion that it would not be for the welfare of the child to remove the guardian, and refused to give directions as to the religious education of the infants. The Court of Appeal upheld his judgment, pointing out that it was now clear that the Court had jurisdiction to interfere with and remove the guardians of children who have no property,

(*h*) [1926] Ch., at p. 684.
(*i*) *Ibid.*, p. 690.
(*k*) *Ibid.*, p. 691.
(*l*) [1893] 1 Ch. 143.
(*m*) 49 & 50 Vict. c. 27, *infra*, p. 460.

on proof of misconduct, or on its being shown it was for the infants' welfare, although in such cases the jurisdiction is limited by the fact of there being no property out of which the Court can provide maintenance : that the jurisdiction may be invoked by any person as next friend of the infant, but that no next friend, no relation, no kind or charitable person, no co-religionist of the child, no priest or minister of any religion, has in such a case any right whatever beyond that of informing the Court as to what is wrong and asking the Court's assistance on behalf of the infant.

Powers of Divorce Court as to Custody, etc.—The Divorce Acts (*n*) give power to the Divorce Court as to the custody, maintenance, and education of the children of parents divorced or judicially separated; and such orders may be made during the whole period of minority (*o*).

It has been held by the Court of Appeal that the adultery of the wife ought not to be regarded for all time and under all the circumstances as sufficient to disentitle her to access to, or even to the custody of, her infant children, at all events in the case of a daughter under sixteen. The Court will have regard to the circumstances of each case, always bearing in mind that the interest of the infant is the paramount consideration, and not the punishment of the guilty spouse (*p*).

Enforcing Order as to Custody.—The order, if disobeyed, may be enforced by directing the Sergeant-at-Arms to take the infant into his custody (*q*).

7. Foreign Guardians and Guardians appointed for Foreign Infants.

The Courts will, if necessary, appoint guardians of an infant not domiciled and having no property in this country (*r*). "If there be a foreign child in England with guardians duly appointed in the child's own country, the Court of Chancery may, without any previous inquiry whether the appointment of other guardians in England is or is not necessary, and would or would not be beneficial to the child, make an order for the appointment of English guardians" (*s*). The status of guardian not being a status recognised by

(*n*) 20 & 21 Vict. c. 85, s. 35; 22 & 23 Vict. c. 61, s. 4.

(*o*) *Thomasset* v. *T.*, [1894] P. 295; *Judkins* v. *J.*, [1897] P. 138.

(*p*) *B.* v. *B.*, [1924] P. 176. See also *Stark* v. *S.*, [1910] P. 190, 193.

(*q*) *G.* v. *L.*, [1891] 3 Ch. 126; Seton (7th ed.), p. 1003.

(*r*) *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42; *Hope* v. *H.*, 4 De G. M. & G. 328; *Re Willoughby*, 30 Ch. D. 324; Simpson (4th ed.), p. 173.

(*s*) *Per* Lord Campbell in *Stuart* v. *Bute*, 9 H. L. C. 440, 464; see also *Nugent* v. *Vetzera*, 2 Eq. 704; Seton (7th ed.), p. 994.

the law of this country, unless constituted in this country, it is not a matter of course to appoint the foreign guardian to be English guardian (*t*). Some one within the jurisdiction would generally be appointed, over whom the Court could exercise an effective control (*u*).

In dealing with guardians appointed by foreign Courts, the Courts will have regard to the principles of international law, and will recognise the proceedings of the regularly constituted tribunals of civilised communities (*x*). They will, therefore, carry out the orders of a foreign Court, provided they do not conflict with our own laws, and will remove guardians appointed here who do not carry out such orders; as, for instance, by changing the form of religious education given to the child (*y*).

For the same reason, the Court will not interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove foreign infants from England in order to complete their education in their own country. But, nevertheless, the Court will not discharge an order by which guardians have been appointed over the children in this country, and will merely reserve to the foreign guardian the exclusive custody of the children to which he was entitled by order of the Court of his own country, and will on proper application allow the foreign guardian to remove them from the jurisdiction (*z*).

8. Powers under Statutes.

The relative rights of the father and mother in respect of their infant children have been profoundly modified in favour of the mother by recent legislation, which also makes statutory the rule of equity that the governing consideration in questions concerning the custody, etc., of an infant is the infant's benefit. Such legislation, moreover, increases the power of the State (through its Courts) to interfere with the control of an infant, even in respect of the infant's marriage, and although the parents may be alive. A statutory power to adopt an infant is also conferred.

(*t*) *Stuart* v. *Bute*, 9 H. L. C., at p. 470.

(*u*) *Johnstone* v. *Beattie* and *Stuart* v. *Bute*, *supra*; and see *Ex p. Watkins*, 2 Ves. Sen. 470.

(*x*) *Re White*, [1918] 1 Ir. R. 19.

(*y*) *Di Savini* v. *Lousada*, 18 W. R. 425; *Re Bourgoise*, 41 Ch. D. 310; Simpson (4th ed.), p. 173.

(*z*) *Nugent* v. *Vetzera*, 2 Eq. 704; cf. *Dawson* v. *Jay*, 3 De G. M. & G. 764; *Re Bourgoise*, *supra*.

Eyre v. Countess of Shaftsbury.

An Act to amend the Law as to the Custody of Infants. 36 & 37 Vict. c. 12.

By section 2 of this Act it is provided that no agreement contained in any separation deed between the father and mother of an infant is to be held invalid by reason only of its providing that the father of such infant shall give up the custody or control thereof to the mother : but no Court is to enforce any such agreement if of opinion that it will not be for the benefit of the infant to give effect thereto.

The Guardianship of Infants Act, 1886. 49 & 50 Vict. c. 27.

Section 2, which has been repealed by the Guardianship of Infants Act, 1925, provided for the mother becoming, on the death of the father, the guardian of such infant, either alone or jointly with a guardian appointed by the father; and section 3 (which has also been repealed) gave certain powers to a mother of appointing a guardian to her infant children.

Section 4 provides that a guardian (in England) under the Act is to have all such powers over the estate and the person, or over the estate (as the case may be), of an infant as any guardian appointed by will or otherwise now has under the Act 12 Car. 2, c. 24, or otherwise. And by section 5 the Court may, upon the application of the mother of any infant (who may apply without next friend), make such order as it may think fit regarding the custody of such infant and the right of access thereto of either parent, having regard to the welfare of the infant, and to the conduct of the parents, and to the wishes as well of the mother (*a*) as of the father, and may alter, vary, or discharge such order on the application of either parent, or, after the death of either parent, of any guardian under the Act (*b*).

Under section 6 the High Court is given power, on being satisfied that it is for the welfare (*c*) of the infant, to remove from his office any testamentary guardian, or any guardian appointed or acting by virtue of the Act, and to appoint another guardian in place of the guardian so removed (*d*). And (section 7) where a decree for judicial separation, or a decree either nisi or absolute for divorce, is pronounced, the Court pronouncing such decree may

(*a*) See section 3 of the Guardianship of Infants Act, 1925, *post*.
(*b*) See *Re A and B* (*infants*), [1897] 1 Ch. 786; *B.* v. *B.*, [1924] P. 176.
(*c*) See *Smart* v. *S.*, [1892] A. C., at p. 436.
(*d*) *Re McGrath*, [1893] 1 Ch. 143.

declare (*e*) the parent by reason of whose misconduct it is made to be unfit to have the custody of the children of the marriage; and, in such case, the parent so declared to be unfit is not, upon the death of the other parent, to be entitled as of right to the custody or guardianship of such children (*f*).

The Custody of Children Act, 1891. 54 Vict. c. 3.

By this Act (section 2) it is provided (*inter alia*) that if at the time of the application by a parent for a writ or order for the production of a child, such child is being brought up by another person, the Court may, if it orders the child to be given up to the parent, further order that the parent shall pay to such person the costs incurred in bringing up such child.

The Summary Jurisdiction (Married Women) Act, 1895.

Section 4 provides (*inter alia*) that a married woman whose husband has been convicted of an aggravated assault upon her, or has deserted or been guilty of persistent cruelty to her, may apply to a Court of summary jurisdiction; and such Court (section 5) may make an order providing (*inter alia*) that the applicant be no longer bound to cohabit with her husband, and that the custody of any children of the marriage while under the age of sixteen be committed to the applicant. The Court (section 7) may vary or discharge any such order, and (section 10) may refuse to make an order in cases considered by it more suitable for being dealt with in the High Court.

The Guardianship of Infants Act, 1925.

By section 1, where in any proceeding before any Court, the custody or up-bringing of any infant, or the administration of any property belonging to an infant is in question, the Court shall have regard to the welfare of the infant as the primary consideration (*g*). Section 3, sub-section 1 provides that the power of the Court under section 5 of the Act of 1886 to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant may be

(*e*) *Handford* v. *H.*, 63 L. T. 256; *Webley* v. *W.*, 64 L. T. 839; *Hitchings* v. *H.*, 67 L. T. 530. Cf. *Witt* v. *W.*, *Manders* v. *M.*, 63 L. T. 627.

(*f*) This power is in addition to that under the Matrimonial Causes Act, 1859, *Webley* v. *W.*, 64 L. T. 839; *Hitchings* v. *H.*, 67 L. T. 530.

(*g*) *Re Thain*, [1926] Ch. 676, 689.

then residing with the father. By sub-section 2, where the Court makes an order giving the custody to the mother, then, whether or not the mother is then residing with the father, the Court may order the father to pay to the mother, towards the maintenance of the infant, such weekly or other periodical sum as the Court, having regard to the means of the father, may think reasonable; but by sub-section 3 no such order for custody or maintenance is to be enforceable and no liability thereunder is to accrue while the mother resides with the father, and any such order is to cease to have effect if for three months after it is made the mother continues to reside with the father. By section 7 jurisdiction under the Act is given to Courts of summary jurisdiction, subject as therein mentioned.

Section 9 deals with the question of the consents required on an infant's marriage. In the case of a marriage intended to be contracted on the issue of a certificate by a Superintendent Registrar, the consents of the persons mentioned in the Schedule to the Act are required, subject to a proviso giving power to the Court to overrule the refusal by a person whose consent is required to give such consent. By sub-section 3, in the case of a marriage intended to be solemnised by banns, the persons whose consent is required to such marriage are to be the persons entitled to give notice of dissent under the Marriage Act, 1823, s. 8; and sections 16 and 17 of that Act were repealed (sub-section 5). Sub-section 6 expressly provides that nothing in the section is to dispense with the necessity of obtaining the consent of the High Court to the marriage of a ward of Court. The Schedule specifies the consents required (where the marriage is not by banns), and such consents vary according as both parents are living, or only one, or neither; and if both are alive, according as they are living together or are divorced or separated. In the case of an illegitimate child, the consent required is that of the mother, unless she has been deprived of the custody by an order of the Court, but if the mother is dead and has appointed a guardian, the consent of such guardian is required.

The Adoption of Children Act, 1926. 16 & 17 Geo. 5, c. 29.

Section 1 provides that upon application by a person desirous of adopting an infant who has never been married, the Court may make an adoption order.

Section 2 contains a number of important restrictions on the

power conferred by section 1. Such an order is not to be made where the applicant is under twenty-five, or where the applicant (unless the parties are within the prohibited degrees of consanguinity) is less than twenty-one years older than the infant; nor is such an order to be made where the sole applicant is a male and the infant is a female. It is further provided that such an order shall not be made without the consent of the infant's parent or guardian (subject to the power of the Court in certain cases to dispense with such consent); nor is it to be made upon the application of one of two spouses without the consent of the other, subject to the right of the Court, under certain circumstances, to dispense with such consent. An adoption order may not be made in favour of an applicant who is not resident and domiciled in England or Wales, or in respect of an infant who is not a British subject and so resident.

Section 3 sets out matters in respect of which the Court must be satisfied before an adoption order is made; one of the matters upon which the Court has to be satisfied is that the order will be for the infant's welfare, "due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant."

Section 5 provides that upon an adoption order being made, all rights and obligations of the parent or guardian in relation to the future custody, maintenance, and education of the adopted child are to be extinguished, and the same are to rest in and be enforceable against the adoptor.

HUSBAND AND WIFE.

SCOTT *v.* TYLER.

1787, 1788. 2 Bro. Ch. 431; Dick. 712.

Conditions in Restraint of Marriage.—Public Policy.

Legacy to a daughter, one moiety of which was to be paid to her at twenty-one, if then unmarried, and the other moiety at twenty-five, if then unmarried; but in case she married before twenty-one, with the consent of her mother, to be settled upon her as mentioned in the will. The daughter married under twenty-one, without the consent of her mother: Held, that the legacy did not vest in the daughter upon the marriage, and that she never came under the description to which the gift of the legacy was attached.

Richard Kee (*a*), the putative father of the plaintiff Margaret Christiana Scott, by his will devised as follows:—"I will that my executors, hereinafter named, do, with all convenient speed after my decease, purchase the sum of £5,000 South Sea Annuities, 1751, in their names, upon trust that they, or the survivors or survivor of them, do stand possessed thereof, and receive the dividends from time to time as the same shall grow due, and thereout pay and apply the sum of £60 yearly, and every year, in and towards the maintenance and education of my grandson, Richard Dryer, till he shall arrive at the age of fifteen years; and if my said grandson should then choose to go to the university, from thenceforth to pay and apply £120 per annum in and towards his said maintenance and education at the university; but if my said grandson shall not go to the university, I will that, out of the sum of £5,000 and the dividends and savings arising thereon then made, a sum not exceeding £400 be applied in placing out my said grandson to any trade, profession or employment he may, with the approbation of my executor, choose.

(*a*) The statement of the case and arguments are taken from 2 Bro. Ch. 431; the judgment from Dick. 712.

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And my will and meaning is, that the surplus dividends, if any, over and beside such allowances as aforesaid, from time to time be invested in the like South Sea Annuities, and that the said *capital sum, with such surplus dividends, be transferred to my said grandson at his age of twenty-one years*, if he shall be living, but *if he shall die before that age*, I give the said annuities between Mrs. Elizabeth Tyler, who now lives with me, and *my god-daughter, Margaret Christiana Tyler, equally to be divided between them, share and share alike*, but the share of my god-daughter not to be transferred to her till twenty-one. And if she shall die before her arrival at that age, I give her share to the said Elizabeth Tyler, for her own use and benefit; also I will that my executors hereinafter named, do, with all convenient speed after my decease, purchase the sum of £10,000 South Sea Annuities, 1751, in their names, upon the trusts after mentioned, that is to say, upon trust that they and the survivor and survivors of them do stand possessed thereof, and out of the dividends pay or permit the said Elizabeth Tyler to take or receive yearly, and every year, as the same shall become payable, the sum of £100 for the maintenance and education of my said god-daughter, Margaret Christiana Tyler, until her age of twenty-one years, which will be on June 18, 1785, and add the surplus of such dividends from time to time to the said capital stock; and at her said *age of twenty-one years*, I will that *one moiety of the said capital stock of* £10,000 and the savings thereof, be *paid and transferred to my said god-daughter, in case she shall then be unmarried*; and that, at *her age of twenty-five years, if she shall then be unmarried, I will that the other moiety* of the said £10,000 *be* then *transferred to her* for her own use and benefit; but *in case my said god-daughter shall marry before her said age of twenty-one years, with the consent of her said mother, Elizabeth Tyler*, I will that *one moiety* of the said £10,000, with the savings made, *be settled* on my said god-daughter, for *her separate use, and her issue*, in such manner as her said mother, Elizabeth Tyler, shall think proper, and the *other moiety thereof*, with the surplus dividends, disposed of, *as she, my said god-daughter, shall think fit*; but *in case* my said god-daughter shall *depart this life before her arrival at the*

age of twenty-five years, unmarried, then, and in such case, I give the said £10,000 *to her said mother, Elizabeth Tyler, for her own use and benefit.* I give, devise, and bequeath to my executors, and to their heirs, all my freehold messuages or tenements, with the appurtenances, in Denmark Court in the Strand, being Nos. 2, 3, 4, and 5, in trust that they and the survivor of them, and the heirs and assigns of such survivor, do from time to time receive the rents and profits thereof, and lay out the same in Government securities, to the use of my aforesaid god-daughter, Margaret Christiana Tyler, till her age of twenty-one years; and from and after her attaining that age, I give the said messuages, and the rents, issue, and profits received by my said executors in the mean time, to my said god-daughter, her heirs, executors, administrators, and assigns, for ever; but if my said god-daughter shall depart this life before she shall attain the age of twenty-one years, I give and devise the said messuages, or tenements and premises, to my said grandson, Richard Dryer, if living, his heirs and assigns; but if dead, I give and devise the same to the said Elizabeth Tyler, her heirs and assigns for ever." He then gave other dispositions not material to this case and appointed the aforesaid Elizabeth Tyler, George Shakespear the elder, Charles Mahew, and Philip Nind, his executors and trustees.

In 1774, James Cockburn left to the plaintiff Margaret Christiana Tyler a legacy of £100, and made the defendant Tyler executrix, and Richard Kee died in September, 1776, without revoking his will. The plaintiff Samuel Scott, about the latter end of 1782, paid his addresses to the other plaintiff, Margaret Christiana, and by her consent made proposals to the defendant Elizabeth Tyler relative to a marriage with her daughter, offering to settle her own fortune, together with a reasonable part of his own, upon the marriage, which proposal was rejected by the defendant; but on May, 17, 1783, he married the other plaintiff, Margaret Christiana, *without her mother's consent.*

In 1786, Elizabeth Tyler became a bankrupt.

The original and supplemental bill prayed (amongst other things) that the right of Margaret Christiana to the £10,000

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South Sea Stock might be declared, and the same settled on the marriage.

The defendant Elizabeth Tyler by her answer denied that the marriage of the plaintiff was by her consent, and insisted that, for want of performance of that condition, the plaintiff Margaret Christiana had forfeited her legacy of £10,000 South Sea Annuities, which had fallen into the residuary estate of the testator.

The case was argued on three days in Easter and three in Trinity Term, 1787.

Mr. Mansfield, for the plaintiffs.—Margaret Christiana Tyler, having married under her age of twenty-one, is entitled to the legacy of £10,000. If she married under that age, a moiety was to be settled on the marriage, the other to be paid as she should direct. She, having married, is therefore become entitled to it. It is objected that she is not entitled, because her marriage with the other plaintiff was not with the consent of her mother, whose consent was made necessary by the testator's will. The doctrine of our law is that wherever there is a personal legacy or a portion payable out of money only, and not out of land, and a condition is annexed of not marrying without consent, the clause restraining marriage is construed to be *in terrorem* only, and void; and it is immaterial whether the condition be precedent or subsequent. In this point our law follows the civil law, as far as personal property is concerned. He cited the cases mentioned below (*b*).

Mr. Scott (*c*), on the same side.—Independently of the clause containing the condition of marrying with consent, it may be argued that the testator intended the legatee to have the £10,000 in every event except one; namely, that of her dying unmarried under the age of twenty-five years, which, by her marriage, is now become impossible. On the authorities, it is clear that this being a personal legacy, the condition, as far as it requires the

(*b*) *Hervey* v. *Aston*, Cas. t. Talb. 212, 1 Atk. 361, and Comyns' Rep. 726; *Reynish* v. *Martin*, 3 Atk. 330; *Elton* v. *E.*, 1 Wils. 159.

(*c*) Afterwards Earl of Eldon.

consent of Mrs. Tyler, is *in terrorem* only, and therefore void in law; and that, in fact, the condition, as far as it is legal, is complied with by the marriage. He cited the cases and authorities mentioned below (*d*).

Mr. Alexander, on the same side.

Mr. Hardinge, for the defendant Elizabeth Tyler and her assignees.—(1) One of the four alternative contingencies upon which the daughter's interest is to depend, and which alone can found her claim to the limitation of this entire sum for her benefit, is not accomplished. She has not "married before the age of twenty-one with her mother's consent." The alternative, respecting this marriage with consent, is not merely formal, nor is it by way of substitution for other alternatives, and with an equal benefit annexed, but substantially different, and with additional benefit. She is to attain the age of twenty-one—a mere contingency of time—or she is to attain it unmarried; or she is to attain the age of twenty-five before marriage; or she is to marry with her mother's consent under the age of twenty-one. Upon every one of these alternatives after the first, her state is improved. In the first event, she is to have certain freehold houses. In the second, she is to have an immediate £5,000. In the third she is to have an additional £5,000. In the fourth, she is to have £10,000 before the age of twenty-one; but £5,000 is to be settled upon the marriage. The fourth contingency, interposing its earlier effects, saves the legatee from the restraint of the other stipulations, and by an act very much in her own power. The will does not compel her to be unmarried, or to wait for the age of twenty-five, or even that of twenty-one, before her marriage; for she is only to marry with her mother's consent before twenty-one, and the £10,000 is from that instant her own.

(2) There is no condition respecting marriage after the age of twenty-five; and there is no condition requiring consent after the age of twenty-one. The contingency of time is definite, but

(*d*) *Long* v. *Dennis*, 4 Burr. 2052; Godolph. Orphan's Leg. b. 1, c. 15; Godolph. b. 3, c. 17; Swinburne, b. 4, c. 12, p. 266; *Wheeler* v. *Bingham*, 1 Wils. 135; *Piggott* v. *Morriss*, Sel. Ch. Cas. 26; 2 Eq. Cas. Abr. 214; *Underwood* v. *Morris*, 2 Atk. 184; *Semphill* v. *Bayly*, Pr. Ch. 562; *Garbut* v. *Hilton*, 1 Atk. 381; *Bellasis* v. *Ermine*, 1 Ch. Cas. 22.

coupled with a condition essential to its benefit, or indefinite, except as falling within a certain period, but so as to admit of being defined by the performance of a condition—the marriage with consent. The will may be construed as if the words had been "when she has attained the age of twenty-five unmarried, or when she has married before twenty-one, with her mother's consent."

(3) There is no direct legacy to the daughter. The gift is to executors; and they are to pay at the several periods for her benefit.

(4) She has a sure provision if she arrives at the age of twenty-one, married or unmarried, and married with or without consent.

(5) Upon failure of the other events described, there is a marked and clear limitation over to the mother. But it is argued that, upon the failure of this event (*i.e.*, of the marriage before twenty-one, with consent), no limitation over to the mother appears in the will; and it is true that, in terms, no such limitation is to be found. But there is a limitation over of the whole £10,000 directly to the mother, in the very next clause to this, upon the event of the daughter's death before twenty-five unmarried; and she, the mother, is residuary legatee.

Mr. Hargreave (*e*), for the assignees of Mrs. Tyler.—Concerning the £10,000 claimed by Mr. and Mrs. Scott, which is a question of great importance, as it involves the general doctrine of the Court as to gifts on condition of marriage being merely *in terrorem*.

Under the will in question, Mr. and Mrs. Scott claim, in Mrs. Scott's right, the legacy of £10,000 South Sea Annuities, and found their claim thus:—That, Mrs. Scott having married under twenty-one years of age, the material part of the contingency in Mr. Kee's will respecting the legacy has taken effect, and, therefore, that she is entitled to the Stock, with the accumulation of interest. Against this the assignees contend that she is not so entitled, because she has married without the consent of her mother.

(*e*) See Harg. Jur. Arg., vol. i, p. 22.

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The case has been argued on behalf of the plaintiffs in two ways:—First, that Mrs. Scott's title has accrued within the contingencies under the will. Secondly and principally, that the condition in the will, as far as it requires marriage with consent of the mother, is a condition *in terrorem* only, and, as such, null and inoperative.

As to the second and great point in the cause, namely: that it is the rule of the Court, in cases of legacies of personal property, to consider conditions in restraint of marriage as merely *in terrorem*, unless where, upon the breach of the condition, the legacy is expressly devised over to a third person. That such a rule should ever have existed appears wonderful; and if the authorities were out of the case, the rule could not be supported.

The Roman law is the foundation of this rule, for it rejected such conditions as invalid; our Ecclesiastical Courts followed this rule, and when the Courts of equity assumed a concurrent jurisdiction over legacies, they held themselves bound to adopt the same rules (*f*).

Although it cannot be denied to be the law of the Court, yet the Court will not carry it an iota beyond its limits, and should resist its application to such a case as the present, on the following grounds, which the learned counsel argued very fully, namely:

That the doctrine is inapplicable where the condition of marriage is precedent; that the residuary devise in the present case is a sufficient devise over; that the doctrine ought to be confined to immediate and direct legacies, and not to include a trust engrafted upon them, under which latter denomination the legacy in question must be admitted to be.

Mr. Stratford, on the same side.

Mr. Mansfield, in reply.—The question is that made on the will, whether this gift to the plaintiff Mrs. Scott is, or is not, a simple gift of the money in one of two events, or whether

(*f*) Reference was here made to the Lex Papia Poppæa. See Heineccius in legem Papiam Poppæam, 4to, 1726, p. 94. And see an ample commentary on this chapter of the law in the same book, p. 298.

she was, at all events, to have the money in case she married. The first gift in the will is that to Dryer, of £5,000, payable when he should attain the age of twenty-one; if he should die under that age, it was to be divided between the defendant Elizabeth and the plaintiff Margaret Christiana, and if the latter died under twenty-one, it was to go wholly to the defendant Elizabeth. Then comes the bequest upon which the question arises: he directs his executors to purchase £10,000 South Sea Annuities, and gives a direct order that the interest (except the £100 a year maintenance) should accumulate until the plaintiff should attain her age of twenty-one years, then the accumulation was to stop, and half of the Stock, and all the savings, were to be paid to her, and at twenty-five the other moiety was to be paid. Then comes the provision for her marrying under twenty-one, and the gift of the Stock over to the mother, in case she should die under twenty-five, unmarried. He then proceeds to give her the houses at twenty-one, and if she dies under that age he gives them to Dryer, and then to the River Lee Bonds, which he gives to the plaintiff at twenty-one, and if she dies under that age he gives them to the mother, the defendant Elizabeth. He afterwards gives several legacies, and gives the residue to the defendant Elizabeth Tyler. It is a mere blunder by which the legacy is made to vest at twenty-five; he understands and means that she shall have it at twenty-one, if married; but if married before twenty-one, with consent, he meant to accelerate it, and that she should not, in that case, wait till she attained twenty-one. The provisions as to twenty-one and twenty-five are a restraint of the precedent gift of the moiety and savings at twenty-one, at which age he gives her everything else—the houses, the River Lee Bonds, and the contingency in Dryer's legacy of £5,000.

If this be the fair construction, there is no pretence to say the legacy is forfeited by the marriage. On the fair construction, therefore, of the will, according to the true intent of the testator, if she was married she was to have the whole at twenty-one, and the provision in restraint of marriage is as such *in terrorem* only.

If, however, the testator has expressed himself so imperfectly,

that she is obliged to get rid of the objections which have been raised to the legacy, we must consider what has been said on the several points.

There is no distinction between conditions precedent and conditions subsequent, except with respect to lands, or where there is a devise over; and in all other cases a condition in restraint of marriage is void. In reasoning, subsequent conditions ought justly to prevail as much as precedent ones: but the doctrine is established, and it is too late to correct it, at least with respect to subsequent conditions. It is contended, however, that the authorities are different as to precedent conditions; but the authorities put precedent conditions out of the way as much as subsequent ones. The doctrine is adopted from the civil law. They contend the civil law has been misunderstood, and that we are now to give it a new construction. But if there is any error in the manner in which the civil law has been construed, the time for correcting that error is past; the doctrine is now established too strongly to be moved; it has become the law of the Court, and the question only can arise, how it has been understood and adopted. It is of no avail to understand it better than those who adopted and established the rule have done. But, in fact, the civil law does not admit the distinction between precedent and subsequent conditions. What is the difference taken on the other side between these conditions? That precedent conditions are favoured and must prevail; that subsequent ones must be rigorously construed as to their validity, and may be dispensed with where compensation can be made. At law there is no distinction between conditions precedent or subsequent, if the subsequent condition is broken.

It has been endeavoured, on the other side, to bring in the devise over; and they have argued, that, being given to the plaintiff in three events, that in all others the legacy goes to Mrs. Tyler. A devise over exists only where there is a gift to one, if he marry or do any other act: with a gift, if he does not, to another person. A residuary bequest does not amount to a devise over. There is no devise over here, but what there is in every case where there is not an intestacy.

They contended also that here is an alternative provision.

But the testator has said no such thing. The other gifts are without any reference to this legacy of £10,000: if the plaintiff had died under twenty-one, she would, according to their argument, have had nothing, for none of the other gifts vested before that time. There is not the least ground to say that here is an alternative within the meaning of *Gillet* v. *Wray*, where one thing is given in one event and another in another event.

Another ground of argument has been that the restraint is only till twenty-one, though there is a passage in Swinburne, where a restraint to twenty is said to be good; it is only given as his opinion; and although the point might have occurred in two or three of the cases—as *Amos* v. *Horner* and *Creagh* v. *Wilson*, where the restraints were only temporary, yet it was not insisted upon in those cases: and although the restraint in *Underwood* v. *Morris* was only till twenty-one, yet the condition was held void, and not a hint given that the circumstance of its being confined in point of time would make any difference.

It is argued, moreover, that here the restraint was given to a parent. In the civil law, the mother could not be considered as a parent. Is there any possible distinction to be taken between a parent and a guardian? The law makes no such distinction, and reason and common sense agree in this with the law. In *Hervey* v. *Aston* the consent first required was that of the mother; but no distinction was made on that ground.

The objection that this is a trust is also perfectly new. If there is any ground for this distinction, another case must be added to the exceptions upon this subject, that a condition in restraint of marriage annexed to a legacy given in trust for the legatee, will be good, though if the legacy be given immediately to the legatee, it will void. And this is a distinction expected to be adopted in a Court which says that trust estates follow the nature of legal estates. Although the Ecclesiastical Court has not in general a jurisdiction over trusts, it is by no means clear that that Court may not compel the executor to pay the legacy to the party actually entitled; and where the executor is himself the trustee, that Court may undoubtedly compel him to pay it, as he in that case only is what he is in all cases—a trustee for the legatee.

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The cause stood over to December 20, 1788, when it came on for judgment (*g*).

Lord Chancellor Thurlow.—This is a bill filed by Samuel Scott and Margaret Christiana his wife, against Elizabeth Tyler, the residuary legatee and executrix of Richard Kee, George Shakespear, Charles Mahew, and Philip Nind, executors and trustees named in the will of the same Richard Kee, and Richard Dryer, his heir-at-law.

The bill prays that the plaintiff Margaret Christiana's right may be established in a trust fund of £10,000 South Sea Annuities, and that proper accounts may be directed accordingly.

* * * * * * *

The testator died on November 3, 1776, leaving Elizabeth surviving, and Margaret Christiana, his natural daughter by her.

On May 17, 1783, the plaintiff Samuel Scott clandestinely and against the will of Elizabeth, married Margaret Christiana, then an infant of eighteen years. Elizabeth objected to it as an improvident match, by reason of his inferior circumstances, his advanced age, and the family which he had by one of his former wives, and warned her daughter of the consequence.

And, as the plaintiff Samuel Scott states, by a deed of May 13, 1783, he has covenanted to settle Margaret Christiana's fortune on her and her children, after his own death, if she or they should survive him.

The bill further states the will of James Cockburn, who died in October, 1774, leaving Elizabeth Tyler his executrix, and Margaret Christiana a legatee of £100.

All the executors proved Richard Kee's will; Elizabeth Tyler alone acted.

Elizabeth Tyler forthwith transferred £5,000 South Sea Annuities into the names of the trustees, which have been since transferred to Dryer, together with the accumulations, and that legacy has been duly discharged.

(*g*) This judgment is from 2 Dick. 712. Mr. Dickens states in a note, that Lord Thurlow having read his judgment, which was written, gave it to him, and that the following was correctly copied from it.

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In August, 1777, she transferred £10,000 South Sea Annuities into the names of herself and co-trustees, together with the further sum of £1,000 of like Annuities, whereof she has constantly received the produce; she received, in like manner, the rents of the freehold houses and the interest of the securities on the River Lee.

She admits the legacy of £100 to remain due, and that she had assets, but claims a debt of £900 against the plaintiff Samuel Scott.

In March, 1786, Elizabeth Tyler became a bankrupt, a commission issued, and Sir Edward Vernon, Thomas Hankey, John Marr, and Malcolm Cockburn, were chosen assignees.

Upon this matter questions arise, whether, as the case stands, the plaintiffs have any and what interest in the £10,000 South Sea Annuities.

The testator makes four several bequests to his daughter, a contingent interest in the £5,000 South Sea Annuities originally given to Dryer, the £10,000 South Sea Annuities in question, the freehold tenements, and the Lee Bonds, all upon the event of her living till the age of twenty-one, married or unmarried. If she dies before twenty-one, the first, third, and fourth bequests take no place, and yet the interest of the fourth is to be paid to her separate use, notwithstanding her coverture during her infancy; but there is an event upon which the second bequest may take place before twenty-one, namely, *if she marries before that age with the consent of her mother.*

It is impossible not to suspect that the testator has failed of expressing his full intention concerning this bequest of the £10,000. He gave it to the daughter on a double contingency—her age, and being then unmarried; he seems to have meant it for the mother on the contrary event; but he has given it over also to her on a double contingency—the death of the daughter before her age, and unmarried. This leaves a middle case—the premature marriage of the daughter—in which neither can claim under the form of this bequest. Again, he has provided for the anticipation of the daughter's title, by another double contingency; namely, *marriage before twenty-one and with consent of the mother;* but, in case of a marriage between twenty-one and

twenty-five, with or without consent, half the legacy would remain undisposed of; which it can hardly be imagined he meant.

Some endeavours were used to infer, from the terms in which it was given to the mother, that, in all other events, it was meant for the daughter; it is more probable that, in the case of the daughter's not becoming entitled, it was meant for the mother; but neither conjecture is sufficiently collected from the actual expression by any admissible rules of interpretation.

The main argument for the plaintiff turned on this proposition, that one branch of the contingency upon which the legacy was given (or rather anticipated) implied a condition in restraint of marriage, which is merely void, and consequently the legacy became absolute.

In support of this position, innumerable decisions of this Court were quoted; but the cases are so short, and the *dicta* so general, as to afford me no distinct view of the principle upon which the rule is laid down, or, consequently, of the extent of the rule, or of the nature of the exceptions to which its own principle makes it liable.

The earlier cases refer in general terms to the canon law, as the rule by which all legacies are to be governed. By that law undoubtedly all conditions which fall within the scope of this objection—the restraint of marriage—are reputed void, and, as they speak, *pro non adjectis*. But those cases go no way towards ascertaining the nature and extent of the objection.

Towards the latter end of the last and beginning of the present century, the matter is more loosely handled. The canon law is not referred to (professedly at least) as affording a distinct and positive rule for annulling the obnoxious conditions; on the contrary, they are treated as partaking of the force allowed them by the law of England. But in respect of their importing a restraint of marriage, they are *treated at the same time as unfavourable, and contrary to the common weal and good order of society*. It is reasoned that parental duty and affection are violated when a child is stripped of its just expectations; that such an intention is improbably imputed to a parent, particularly in those instances where there was no misalliance, as in marriage

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with the houses of *Bellasis* (*h*), *Bertie* (*i*), *Cecil* and *Semphill* (*k*), which the parent, had he been alive, would probably have approved. These ideas apply indifferently to bequests of land and of money, and were, in fact, so applied in one very remarkable case; nay, to avoid the supposed force of these obnoxious conditions, strained constructions were made upon doubtful signs of consent, and every mode of artificial reasoning was adopted to relax their rigour. This was thought more practicable by calling them conditions subsequent, although, if that had made such difference, they were, and indeed, must have been generally, conditions precedent, as being the terms on which the legacy was made to vest. At length it became a common phrase, that such conditions were only *in terrorem*. I do not find it was ever seriously supposed to have been the testator's intention to hold out the terror of that which he never meant should happen; but the Court disposed of such conditions so as to make them amount to no more.

On the other hand, some provision against improvident matches, especially during infancy, or to a certain age, could not be thought an unreasonable precaution for parents to entertain. The custom of London has been found reasonable, which forfeits the portion on the marriage of an infant orphan without consent (*l*). The Court of Chancery is in the constant habit of restraining and punishing such marriages; and the Legislature (*m*) has at length adopted the same idea, as far as it was thought general regulation could in sound policy go.

In this situation the matter was found about the middle of the present century, when doubts occurred which divided the sentiments of the first men of the age. The difficulty seems to have consisted principally in reconciling the cases, or rather the arguments, on which they proceeded. The better opinion, or at least that which prevailed, was, that devises of land, with which the canon law never had any concern, should follow the rule of

(*h*) *Bellasis* v. *Ermine*, 1 Ch. Ca. 22.
(*i*) *Bertie* v. *Lord Falkland*, 3 Ch. Ca. 129.
(*k*) *Semphill* v. *Bayly*, Pr. Ch. 562.
(*l*) *Foden* v. *Howlett*, 1 Vern. 354.
(*m*) 26 Geo. 2, c. 33.

the common law; and that legacies of money, being of that sort, should follow the rule of the canon law.

Land devised, charges upon it, powers to be exercised over it, money legacies referring to such charges, money to be laid out in lands (though I do not find this yet resolved), follow the rule of the common law, and such trusts are to be executed by analogy to it.

Mere money legacies follow the rule of the canon law; and all trusts of that nature are to be executed with analogy to that.

But still, if I am not mistaken, the question remains unresolved, What is the nature and extent of that rule, as applied to conditions in restraint of marriage?

The canon law prevails in this country only so far as it hath been actually received, with such amplifications and limitations as time and occasion have introduced, and subject at all times to the municipal law. It is founded on the civil law; consequently, the tenets of that law also may serve to illustrate the received rules of the canon law.

By the civil law, the provision of a child was considered as a debt of nature, of which the laws of civil society also exacted the payment, insomuch that a will was regarded as inofficious, which did not in some sort satisfy it.

By the positive institutions of that law, it was also provided, *si quis cælibatus, vel viduitatis conditionem hæredi, legatariove injunxerit; hæres, legatariusve e conditione liberi sunto; neque eo minus delatam hæreditatem, legatumve, ex hac lege, consequantur* (*n*).

In amplification of this law, it seems to have been well settled, in all times, that if, instead of creating a condition absolutely enjoining celibacy, or widowhood, the same be referred to the advice or discretion of another, particularly an interested person, it is deemed a fraud on the law, and treated accordingly; that is, the condition so imposed is holden for void.

Upon the same principle, in further amplification of the law, all distinction is abolished between precedent and subsequent conditions; for it would be an easy evasion of such a law, if a

(*n*) Heineccius ad legum Papiam Poppæam, 1776, p. 294. And see the Commentary, p. 298.

slight turn of the phrase were allowed to put it aside. It has rather, therefore, been construed that the condition is performed by the marriage, which is the only lawful part of the condition, or by asking the consent; for that alone is a lawful condition; and for the rest, the condition not being lawful, is holden *pro non adjecta.*

On the other hand, the ancient rule of the civil law has suffered much limitation in descending to us.

The case of widowhood is altogether excepted by the Novels (*o*); and injunctions to keep that state are made lawful conditions.

So is every condition which does not, directly or indirectly, import an absolute injunction to celibacy.

Therefore, an injunction to ask the consent (*p*), as I have said before, is a lawful condition, as not restraining marriage generally.

A condition not to marry a widow is no unlawful injunction, for the reason given before.

So, of an annuity to a widow during her widowhood (*q*).

A condition to marry, or not to marry, Titus or Mævia, is good, for this reason, that it implies no general restraint; besides, in the first case it seems to have a bounty to Titus or Mævia in view (*r*).

In like manner, the injunction which prescribes the due ceremonies, and the place of marriage, is a lawful condition, and is not understood as operating the general prohibition of marriage.

Still more is a condition good, which only limits the time to twenty-one (*s*), or any other reasonable age, provided this be not evasively used as a covered purpose to restrain marriage generally. And this must obtain still more forcibly where the *lex loci* implies the same restraint.

Nay, according to Godolphin, the use of a thing may be

(*o*) Novell. 22, c. 44.

(*p*) *Sutton* v. *Jewke*, 2 Ch. R. 9; *Creagh* v. *Wilson*, 2 Vern. 572; *Ashton* v. *A.*, Pr. Ch. 226; *Chauncy* v. *Graydon*, 2 Atk. 616; *Hemmings* v. *Munkley*, 1 Bro. Ch. 304; *Dashwood* v. *Bulkeley*, 10 V. 230; *Re Whiting's Settlement*, [1905] 1 Ch. 96; *Re Chapman*, [1904] 1 Ch. 431.

(*q*) *Jordan* v. *Holkham*, Amb. 209; *Barton* v. *B.*, 2 Vern. 308.

(*r*) *Jervoise* v. *Duke*, 1 Vern. 19; *Randal* v. *Payne*, 1 Bro. Ch. 55.

(*s*) *Stackpole* v. *Beaumont*, 3 V. 89.

given during celibacy; for the purpose of intermediate maintenance will not be interpreted maliciously, to a charge of restraining marriage (*t*).

It seems also agreed on all hands that when, on any condition, however restrictive of marriage, the legacy is given over to pious uses, the intention of the party shall be deemed to regard those uses, and not to have aimed at the objectionable purpose of restraining marriage (*u*).

As we receive the canon law, a bequest over, to any purpose, or person, shall be interpreted in the same manner, and make a conditional limitation.

It was made a question, formerly, what a legatee should take on her marriage, under a bequest of £200 if she married, or £100 if she did not. Some thought £300, some £200, some £100. In our books we find it determined formerly, in the case of a greater legacy given upon marriage with consent, or after a certain age, and a less in the other events, that the greater legacy was not forfeited by marrying against the condition (*x*); but those decisions happened in the period alluded to before, when the worth of the alliance was thought a sufficient reason for a favourable interpretation, as it was called, of the condition; but Lord Cowper determined otherwise, on alternative bequests (*y*).

It is true that the foregoing limitations, which are detailed in Swinburne and Godolphin, are not found in our reports so expressly stated; but the cases did not call for such particularity, except those few alluded to before, which turned upon the looser doctrine of favourable interpretation, and that, which is not to be supported, of *Underwood* v. *Morris* (*z*), and which was determined by Parker, J., sitting for the Lord Chancellor. It does not appear by any report that I have seen to have been closely considered; it is contrary to the canon and civil law, and apparently unreasonable, the restraint having been imposed only till twenty-one, and the marriage contracted improvidently at

(*t*) See *Webb* v. *Grace*, 2 Ph. 701, reversing *S. C.* 15 Si. 384; *Morley* v. *Rennoldson*, 2 Ha. 570, 580. (*u*) Swinb. Part 4, sects. 12, 14.

(*x*) *Hicks* v. *Pendarvis*, Freem. Ch. Rep. 41; 2 Eq. Ca. Abr. 212; *Bellasis* v *Ermine*, 1 Ch. Ca. 22.

(*y*) *Creagh* v. *Wilson*, 2 Vern. 572; *Gillet* v. *Wray*, 1 P. W. 284.

(*z*) 2 Atk. 184.

sixteen. I therefore agree with the late Lords Commissioners (*a*) in denying the authority.

Sir Dudley Rider, in arguing the case of *Hervey* v. *Aston*, expressly founds his argument on the perpetuation of the restraint; and Dr. Strahan, who argued on the same side, admits the qualification of time, place, and person, as given before.

The will before us contains a residuary bequest; but that has been repeatedly, and well enough determined, to leave the conditional legacy *in statu quo* (*b*); it only prevents that which has not been disposed of already, whatever be its amount, from falling by order of law to the executor or next-of-kin.

But the great vice of the argument in favour of the daughter lies here. It was not contended against the rules above mentioned, if the bequest had been to her at twenty-one or twenty-five, in case she was then unmarried, without more, that she could have claimed the legacy at any other time, or in any other case. But, because the mother was empowered to accelerate the gift by her consent to a proper marriage, and a proper settlement, it was thence argued that it was indirectly putting an illegal constraint upon marriage. Now, if the first branch of the gift did not impose a direct restraint, in contradiction of law, the relaxation of that condition certainly would not operate as an indirect restraint of the same nature.

I am therefore of opinion that the daughter, having married at eighteen improvidently, so far as appears, and against the anxious prohibition of the mother, never came under the description to which the gift of the £10,000 was attached.

It was therefore void, and a part of the residue; consequently, it belongs to the assignees of the mother, the defendants; and the bill must be dismissed, so far as it seeks to have that trust executed.

(*a*) See *Hemmings* v. *Munkley*, 1 Bro. Ch. 304; and see *Stackpole* v. *Beaumont*, 3 V. 89; *Knight* v. *Cameron*, 14 V. 389; *Clifford* v. *Beaumont*, 4 Russ. 325.

(*b*) *Semphill* v. *Bayly*, Pr. Ch. 562; *Payet* v. *Haywood*, cited 1 Atk. 378, overruling *Amos* v. *Horner*, 1 Eq. Ca. Abr. 112, pl. 9, but where there is an express direction that the forfeited legacy shall fall into the residue, see *Wheeler* v. *Bingham*, 3 Atk. 364; *Lloyd* v. *Branton*, 3 Mer. 108, overruling *dictum* in *Reeves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; and see *Ellis* v. *E.*, 1 Sch. & L. 1; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

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NOTES.

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1. Generally.

Upon principles of public policy, conditions annexed to legacies, or contracts, operating unduly in restraint of marriage, as well as contracts entered into for the purpose of promoting marriage for reward, or in fraud of one of the parties to the marriage or their friends, are utterly null and void. This note deals with the subject of conditions in restraint of marriage. The refined distinctions as to the legality or illegality of these conditions, which have been made in the Ecclesiastical Courts and in Courts of equity, apply only to *personal legacies and money* arising from the sale of lands directed to be sold by a valid testamentary trust (*c*). As to legacies out of real estate, they follow the rule that the common law prescribes and common sense supports, and conditions as to marriage annexed to them, not being otherwise illegal, are held binding. This distinction is said to have arisen from blind superstitious adherence of the ecclesiastical lawyers to the text of the civil law. Lord Loughborough, C., said : " They never reasoned, but only looked into the books and transferred the rule, without weighing the circumstances, as positive rules to guide them " (*d*). But the Courts of equity in this matter have very largely departed from the civil law, and have made new rules applicable to legacies out of personal estate (*e*).

2. Testamentary Gifts.

By the common law, all conditions annexed to legacies *generally* prohibiting marriage (by which is meant a lawful marriage) (*f*), are void, as being " contrary to the common weal and good order

(*c*) See Jarman, Wills (6th ed.), p. 1525; *Bellairs* v. *B.*, 18 Eq. 510, 516.

(*d*) *Stackpole* v. *Beaumont*, 3 V. 89, 96; and see the judgment of Vaughan Williams, L.J., in *Re Whiting's Settlement*, [1905] 1 Ch., at p. 116.

(*e*) *Bellairs* v. *B.*, 18 Eq., at pp. 513, 515.

(*f*) *Re M'Loughlin*, 1 L. R. Ir. 421.

of society" : *per* Lord Thurlow in the principal case, p. 476, *supra* (*g*).

So also conditions such as lead to a *probable* prohibition of marriage are void. Thus, where a legacy was given by a testator to his daughter, payable on her marriage or age of twenty-one, upon condition "that she shall not marry without consent, or shall not marry a man who shall not be seised of an estate in fee-simple, or of freehold property of the clear yearly value of £500," the condition was held void, as being too general (*h*).

It seems, however, that by our law, conditions in restraint of marriage, even though not in terms limited, are only *prima facie* void, and may be treated as valid if it appear that it was not the testator's object to interfere with marriage (*i*).

Conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid; subject, however, to the presumption, in the case of personal estate, that, in the absence of a gift over, the condition is intended to be *in terrorem* merely (*k*). Thus, a condition to marry or not to marry any particular person or persons (*l*); or a native of any particular country (*m*); or a person belonging to a particular class, as a domestic servant (*n*); or a kinsman, *e.g.*, a person within the degree of third cousin (*o*); or a person belonging to a particular religion, as a Papist (*p*); or a person not professing the Jewish religion, or not born a Jew, though converted to Judaism (*q*); or a condition which prescribes the ceremonies of marriage, as those of the Quakers (*r*); or which prohibits marriage before twenty-one, or other reasonable age (*s*), even before twenty-eight (*t*), is not illegal.

(*g*) See *Keily* v. *Monck*, 3 Ridg. P. C. 205, 244, 247, 261; *Hervey* v. *Aston*, Com. Rep. 726, 729; *S. C.*, 1 Atk. 361; 1 Eq. Ca. Abr. 110, pl. 2 (n.) a; *Rishton* v. *Cobb*, 9 Si. 615, 619, 5 My. & C. 145; *Morley* v. *Rennoldson*, 2 Ha. 570; *Connelly* v. *C.*, 7 Moore, P. C. C. 438. As to real estate, see p. 487, *infra*, Note 4.

(*h*) *Keily* v. *Monck*, 3 Ridg. P. C. 205. And see *Long* v. *Dennis*, 4 Burr. 2052; *Ellis* v. *E.*, 1 Sch. & L. 1.

(*i*) *Re Hewett*, [1918] 1 Ch. 458, 468.

(*k*) See *infra*, p. 489.

(*l*) *Jarvis* v. *Duke*, 1 Vern. 19; *Randal* v. *Payne*, 1 Bro. Ch. 55; *Davis* v. *Angel*, 2 De G. F. & J. 524; *Re Bathe*, [1925] 1 Ch. 377; Theob. (8th ed.), 639.

(*m*) *Perrin* v. *Lyon*, 9 East, 170.

(*n*) *Jenner* v. *Turner*, 16 Ch. D. 188.

(*o*) *Re Chapman*, [1904] 1 Ch. 431; [1905] A. C. 106.

(*p*) *Duggan* v. *Kelly*, 10 Ir. Eq. R. 295.

(*q*) *Hodgson* v. *Halford*, 11 Ch. D. 959.

(*r*) *Haughton* v. *H.*, 1 Moll. 611.

(*s*) *Stackpole* v. *Beaumont*, 3 V. 89; *infra*, p. 486.

(*t*) *Younge* v. *Furse*, 8 De G. M. & G. 756, *infra*, p. 487; and see p. 481, *supra*.

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It seems that a condition not to marry a man of a particular profession or calling, whether there be a limitation over or not, may be considered too wide and therefore illegal (*u*).

Conditions offering an inducement, to husband or wife, to live separate are illegal; thus conditions decreasing an annuity of a wife if she lives again with her husband, or increasing a legacy to a husband if he separates from his wife, are invalid (*x*).

A parent, however, may make a provision for his daughter cease on her taking the veil, or becoming permanently connected with a convent. "The condition is *conditio rei licitæ*, and so the rules derived from conditions in restraint of marriage or otherwise against the liberty of the law, are inapplicable" (*y*). And it is clear that, according to our law, a gift until marriage or remarriage, and when the party marries or remarries then over, is good (*z*). But a woman cannot take under a gift until she remarries where her marriage with the testator is declared void *ab initio* in his lifetime (*a*).

In *Rishton* v. *Cobb* (*b*), Lord Cottenham expressed the view that a bequest of the income of a fund to a lady "so long as she shall continue single and unmarried" is equivalent to a gift in perpetuity, if she does not marry, although a gift during widowhood determines on remarriage or death. This view was disapproved by Lord Selborne in *Re Boddington* (*c*); but Farwell, J., felt himself bound to act upon *Rishton* v. *Cobb* in *Re Howard* (*d*). In a more recent case (*e*), in which a testatrix directed the income of her residuary estate to be paid to her daughter "until she shall marry," and after her marriage to pay to her £3,000 and divide

(*u*) See 1 Eq. Ca. Abr. 110, pl. 2, (n.) a; *Keily* v. *Monck*, 3 Ridg. P. C. 205, 265.

(*x*) *Bean* v. *Griffith*, 1 Jur. (N.S.) 1045; *Cartwright* v. *C.*, 3 De G. M. & G. 982. Cf. *Marlborough* v. *M.*, [1901] 1 Ch. 165; *Re Hope Johnstone*, [1904] 1 Ch. 470; *Re Meyrick's Settlement*, [1921] 1 Ch. 311, 319.

(*y*) *Per* Lord Cranworth, *Dickson's Trusts*, 1 Si. (N.S.) 37, 46; and see *Clavering* v. *Ellison*, 8 De G. M. & G. 662; 7 H. L. Cas. 707; *Re Catt's Trusts*, 2 Hem. & M. 52; *Wainwright* v. *Miller*, [1897] 2 Ch. 255; *Re Hewitt*, [1926] Ch. 741.

(*z*) *Morley* v. *Rennoldson*, 2 Ha. 570, and *infra*, p. 488; *Barton* v. *B.*, 2 Vern. 308; *Jordan* v. *Holkham*, Amb. 209; *Lloyd* v. *L.*, 2 Si. (N.S.) 255, 263; *Newton* v. *Marsden*, 2 J. & H. 356; and see Note 5, *infra*.

(*a*) *Re Boddington*, 22 Ch. D. 597; 25 Ch. D. 685. Cf. *Re Whitfield*, [1911] 1 Ch. 310.

(*b*) 5 My. & C. 145.

(*c*) 25 Ch. D., at p. 688.

(*d*) [1901] 1 Ch. 412.

(*e*) *Re Mason*, [1910] 1 Ch. 695.

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the balance between the sons of the testatrix, and the daughter died without having been married, it was held by the C. A. that the daughter's interest terminated with her death (*f*).

In *Re Hammond* (*g*), the plaintiff, Mrs. B., whose husband was believed to have been drowned, married the testator, who, as well as Mrs. B., knew that it was not certain that her husband was dead. By his will the testator bequeathed benefits to her during her widowhood. After the testator's death it was discovered that B. was alive. It was held by Parker, J., that the words "during her widowhood" did not import a condition, and that the plaintiff was entitled to enjoy the bequest until she died or married again (*h*).

Conditions restraining marriage under the age of twenty-one or other reasonable age, unless with the *consent* of parents, guardians, or executors (and with a gift over in the case of personalty), are valid (*i*).

There is a marked distinction between conditions *precedent* and conditions *subsequent*. Where a condition is precedent, as the estate cannot commence until the condition is performed, the condition is beneficial, as creating an estate, and is construed favourably. Where a condition is subsequent, as it operates by way of destruction of an estate already in existence, it is construed strictly.

3. Conditions Precedent.

A devise of land (*k*), or of a portion to be raised out of land, or a legacy having reference, and given as an augmentation, to a portion to be raised from land (*l*), on condition of *marrying with consent*, will not take effect unless the condition be complied with, even although there be no gift over.

In the case of personal estate, it is settled that where a personal

(*f*) See the comments on *Rishton* v. *Cobb* by Cozens Hardy, M.R., and Buckley, L.J., in *Re Mason*, [1910] 1 Ch., at pp. 699 and 700.

(*g*) [1911] 2 Ch. 342.

(*h*) And see *Re Wagstaff*, [1908] 1 Ch. 162.

(*i*) *Sutton* v. *Jewke*, 2 Ch. R. 9; *Creagh* v. *Wilson*, 2 Vern. 573; *Ashton* v. *A.*, Pr. Ch. 226; *Stackpole* v. *Beaumont*, at p. 486, *infra*; *Clifford* v. *Beaumont*, 4 Russ. 325; *Dashwood* v. *Bulkeley*, 10 V. 230; and see *Beaumont* v. *Squire*, 17 Q. B. 933; *Re Chapman*, [1904] 1 Ch. 431; *Re Whiting's Settlement*, [1905] 1 Ch. 96; and see *Re Hewett*, [1918] 1 Ch. 458.

(*k*) See p. 487, *infra*; *Fry* v. *Porter*, 1 Ch. Ca. 138; *Bertie* v. *Falkland*, 3 Ch. Ca. 129; *Re Nourse*, [1899] 1 Ch., at p. 68.

(*l*) *Reeves* v. *Herne*, 5 Vin. Abr. 343, pl. 41; *Hervey* v. *Aston*, 1 Atk. 361; *Reynish* v. *Martin*, 3 Atk 330; Theob. (7th ed.), pp. 623, 624.

legacy is bequeathed to a person upon marriage under twenty-one, or other reasonable period, *with the consent* of persons designated by the testator, the legacy will not vest unless the consent be first obtained; for the condition is precedent; and, as it imposes no other restraint upon the liberty of marriage than is imposed or allowed by the law and policy of the land, it is good, *whether there be a limitation over or not* (*m*).

In *Stackpole* v. *Beaumont* (*n*), the testator devised his real estates in remainder to the use of L. W., or such person, if any, with whom she should first intermarry, " if before twenty-one, then with the consent of his trustees, or the survivor of them," for their joint lives, and the life of the survivor, etc. Towards the end of his will, he gave to L. W. £10,000, " payable and to be paid to her as follows :—£5,000 upon her marriage with such consent as aforesaid, and £5,000 within two years next afterwards." L. W. while an infant, and a ward of the Court, eloped, and was married in Scotland without the consent of the trustees. Lord Rosslyn held that she was not entitled to the legacy. " Confined to cases," said his Lordship, " where the restraint operates only up to the age, till which, by the law and policy of the country, consent is necessary, I have no difficulty to say there is no authority to lead the Court to pronounce a proposition so repugnant to that law, as that such a condition is invalid. . . . The question is, not whether any forfeiture has been incurred, but whether the parties to whom the legacy is given have put themselves in a situation to answer that description of the person to take. There is no gift here but in the direction to pay; for I cannot stop in the middle of a sentence. He gives her £10,000, that is, in effect, two sums of £5,000, one payable upon her marriage with consent. She has not married with consent. She has married without it. Can she claim the £5,000 under the will? I do not see the great importance of the distinction upon a bequest over of the legacy. It is one of the points that occurred to Judges sitting here, to deliver them from the difficulty arising from the rule of the civil law adopted without seeing the ground and the reason of applying it to this country under different circumstances " (*o*).

(*m*) *Hemmings* v. *Munkley*, 1 Bro. Ch. 304; 1 Cox, 38; overruling *Underwood* v. *Morris*, 2 Atk. 184; *Scott* v. *Tyler*, *supra*; *Re Brown*, 18 Ch. D. 61.

(*n*) 3 V. 89.

(*o*) And see *Clifford* v. *Beaumont*, 4 Russ. 325; *Knight* v. *Cameron*, 14 V. 389; *Re Nourse*, [1899] 1 Ch. 63; but see *Reynish* v. *Martin*, 3 Atk. 330; 1 Wils. 130.

So where there is another legacy or provision for the legatee in the event of marriage without consent (*p*). In both these instances the testator may be considered to have shown it to be his intention, by a gift over to another, in the first, and by a different gift to the legatee in the second case, that the condition should not be taken merely as *in terrorem*.

In *Younge* v. *Furse* (*q*), the Lords Justices, reversing Romilly, M.R., held that where a legacy or annuity is given by a parent to his daughter provided she does not marry before a certain age, as for instance the age of twenty-eight, she will not be entitled to the legacy or annuity if she marry before that age, even with the consent of her parent.

It would seem that where a personal legacy is given, subject to a condition precedent requiring *consent generally*, without reference to the age of the legatee, it is invalid, unless there be a gift over (*r*).

4. Conditions Subsequent.

As to *devises* of *real estate*, it seems that a condition subsequent in *general* restraint of marriage is, *prima facie*, void (*s*).

The question whether such a condition is good appears to depend upon the intention of the testator in making the devise. If the devise is intended as a condition for a woman while she remains single, it is good; but if the intention is that the devisee must remain in a state of celibacy under penalty of losing the gift, the condition is bad (*t*). Thus, in *Jones* v. *J.* (*t*), lands were devised by the testator to his sister M., her daughter E., and S., the daughter of D. Jones, "jointly during their lifetime": "if any or some of the before-mentioned parties named depart this life, his or her share or shares go to my sister, J., wife of J. D., together with her daughter M., during their lifetime." "Provided the said M., daughter of the said J., my sister, shall remain in her present state of single woman, otherwise if she shall alter her

(*p*) *Creagh* v. *Wilson*, 2 Vern. 572; *Gillet* v. *Wray*, 1 P. W. 284; cf. *Holmes* v. *Lysaght*, 2 Bro. P. C. 261; *Reynish* v. *Martin*, 3 Atk. 330; *Re Nourse*, [1899] 1 Ch. 63.

(*q*) 8 De G. M. & G. 756.

(*r*) *Malcolm* v. *O'Callaghan*, 2 Madd. 349; *Gardiner* v. *Slater*, 25 B. 509; Theobald (8th ed.), p. 640.

(*s*) Sheppard's Touch., at p. 132; *Fry* v. *Porter*, 1 Mod. 300; *Cooke* v. *Turner*, 15 M. & W. 727; *Perrin* v. *Lyon*, 9 East 170; *Lloyd* v. *L.*, 2 Sim. (N.S.) 255; *Jenner* v. *Turner*, 16 Ch. D. 188; Jarman (6th ed.), at p. 1539.

(*t*) *Jones* v. *J.*, 1 Q. B. D. 279, 282.

present state of single woman, and bind herself in wedlock, she is liable to lose her share of the said property immediately, and her share to be possessed and enjoyed by the other mentioned parties share and share alike." Mary, the daughter of Jemima, having succeeded to a share of the land, married one Evans. It was held that the estate of Mary Evans in the land ceased on her marriage, for that the object of the testator appeared to be, not to restrain marriage, but to provide for Mary Evans while she was unmarried, and that the question whether the clause amounted to a limitation or condition was immaterial, as the authorities upon such a distinction did not apply to a devise of realty.

A condition subsequent in restraint of marriage, in the case of a tenancy in tail, is void as repugnant (*u*).

In the case of *personalty*, if a *legacy* is given subject to a condition in restraint of marriage which is *general*, and also *subsequent*, then the condition is altogether void, and the legatee retains the interest given to him, discharged of the condition, even although there be a limitation over. Thus in *Morley* v. *Rennoldson* (*x*), the testator bequeathed the residue of his personal estate to his daughter upon trust for her maintenance and support until she attained twenty-one or married with the consent of his trustees under that age; and upon her attaining such age or her marriage, for her separate use, with remainder to her children; and in case of her death without issue, he bequeathed the same to certain legatees in remainder. The testator, afterwards, by a codicil, declared that, in consequence of a nervous debility, his daughter was unfit for the control of herself, and his will was, *that she should not marry; and in case of her marriage* or *death*, he gave the property he had bequeathed to her over to the same legatees in remainder. It was held by Wigram, V.-C., that the restraint upon marriage being general, the condition was void, notwithstanding the limitation over.

The rules governing gifts of personalty apply to cases where the property given, subject to a condition in general restraint of marriage, is a mixed fund arising from the proceeds of realty and personalty (*y*), or is income arising from such a mixed fund, or *semble*, if it be a legacy out of the proceeds of realty directed to

(*u*) *Earl of Arundel's Case*, Jenk., 6 Cent. Ca. 26, at p. 243; 3 Dyer, 342 b.

(*x*) 2 Ha. 570. This case was heard, [1895] 1 Ch. 449 (C. A.), on a point left open by the V.-C.

(*y*) *Lloyd* v. *L.*, 2 Si. (N.S.) 255.

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be converted (*z*), or where the property consists of real and personal estate, given together (*a*).

Where the condition in restraint of marriage is *not general*, but against marriage with a particular person (*b*), or restraining a widow of a testator from marrying again (*c*), nevertheless, in the absence of a gift over, the condition has been construed (in the case of a gift of personal estate) as being *in terrorem* merely (*d*).

Where, however, there is a *gift over* on such a marriage, and even, it seems, where the gift to a *widow* is made to cease upon marriage, a condition subsequent against marriage, attached to a devise or bequest, is valid, not only when the legatee or devisee is the widow of the testator (*e*), but also when she is the widow of another person (*f*), and a gift over on the second marriage of a *man* will be valid (*g*).

Where a legacy is given to a woman absolutely, at a certain time, and there is a subsequent condition requiring *consent* to marriage, the condition will be construed as *in terrorem*, if there be no bequest over, although there be a *diminished gift* to the legatee in the alternative of her marrying without consent (*h*). And if the power of diminishing the legacy is delegated to another person, the condition will be considered as *in terrorem* merely, in the same manner as if the diminution of the legacy had been provided by the testator in his will (*i*).

Should, however, the legacy be limited over to another person on the marriage without consent, the condition will not be considered merely as *in terrorem*, but on breach of it, the gift over will take effect (*k*). Where, on the other hand, a testator declares that, in case of marriage without consent, the legatee shall forfeit

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(*z*) *Bellairs* v. *B.*, 18 Eq. 514, 516; *Re Hart's Trusts*, 3 De G. & J. 195.

(*a*) *Duddy* v. *Gresham*, 2 L. R. Ir. 442.

(*b*) *W.* v. *B.*, 11 B. 621; and see *Poole* v. *Bott*, 11 Ha. 33.

(*c*) *Marples* v. *Bainbridge*, 1 Madd. 590; *Barton* v. *B.*, 2 Vern. 308.

(*d*) *Lloyd* v. *Branton*, 3 Mer. 108; *Re Whiting's Settlement*, [1905] 1 Ch. 96; Jarm. (6th ed.), at p. 1541.

(*e*) *Tricker* v. *Kingsbury*, 7 W. R. 652; *Craven* v. *Brady*, L. R. 4 Ch. 296; *Dickson's Trusts*, 1 Si. (N.S.) 37.

(*f*) *Charlton* v. *Coombes*, 11 W. R. 1038; *Newton* v. *Marsden*, 2 J. & H. 356; *Tricker* v. *Kingsbury*, 7 W. R. 652; cf. *Re Tredwell*, [1891] 2 Ch. 640.

(*g*) *Allen* v. *Jackson*, 1 Ch. D. 399.

(*h*) *Garret* v. *Pritty*, 2 Vern. 293; 3 Mer. 120 (n.). But see *Re Nourse*, [1899] 1 Ch. 63, and cf. *Re Hewitt*, [1918] 1 Ch. 458.

(*i*) *Wheeler* v. *Bingham*, 3 Atk. 367.

(*k*) *Stratton* v. *Grymes*, 2 Vern. 357; *Barton* v. *B.*, 2 Vern. 308; *Re Whiting's Settlement*, [1905] 1 Ch. 96.

what had been before given, but does not say what is to become of the legacy, the declaration is wholly inoperative (*l*).

It seems that the mere gift of a residue, as is laid down by Lord Thurlow, in the principal case, will not be considered as a bequest over, for it has been repeatedly determined that that will leave the legacy *in statu quo*, as it only prevents that which has not been disposed of already, whatever be its amount, from falling, by order of law, to the executor or next-of-kin (*m*). But there is a clear distinction between a mere residuary bequest, and a direction that a legacy should sink into and form part of the residue; for that is tantamount to a gift over to the persons participating in the residue (*n*).

5. Limitations until Marriage as Distinguished from Conditions.

"Although in some respects a condition and a limitation may have the same effect, yet in English law there is a great distinction between them" (*o*). The Court should first determine whether the particular words are words of limitation or constitute a condition, and then apply the law (*p*). The distinction does not apply to real estate (*q*).

Where property is limited to a person until marriage, and upon marriage then over, the limitation is good. "It is difficult," says Wigram, V.-C., "to understand how this could be otherwise: for in such a case there is nothing to give an interest beyond the marriage. If you suppose the case of a gift of a certain interest, and that interest sought to be abridged by a condition, you may strike out the condition and leave the original gift in operation; but if the gift is until marriage, and no longer, there is nothing to carry the gift beyond the marriage" (*r*).

(*l*) *Lloyd* v. *Branton*, 3 Mer., at p. 117.

(*m*) *Paget* v. *Haywood*, cited 1 Atk. 378; *Keily* v. *Monck*, 3 Ridg. P. C. 235, 252; overruling *Amos* v. *Horner*, 1 Eq. Ca. Abr. 112, pl. 9; see *Bellairs* v. *B.*, 18 Eq. 510.

(*n*) *Wheeler* v. *Bingham*, 3 Atk. 368; *Lloyd* v. *Branton*, 3 Mer. 108, 118; cf. *Stevenson* v. *Abington*, 11 W. R. 935.

(*o*) *Per* Cotton, L.J., in *Re Moore*, 39 Ch. D., at p. 129; cf. *Re Wilkinson*, [1926] Ch. 842.

(*p*) See *per* Kay, J., *Re Moore*, 39 Ch. D., at p. 119.

(*q*) *Jones* v. *J.*, 1 Q. B. D. 279, 282.

(*r*) *Morley* v. *Rennoldson*, 2 Ha. 580. See also *Jordan* v. *Holkham*, Amb. 209; *Barton* v. *B.*, 2 Vern. 308; *Low* v. *Peers*, C. J. Wilmot's Cases, 369; *Bird* v. *Hunsdon*, 2 Swans. 342; *Marples* v. *Bainbridge*, 1 Madd. 590; *Evans* v. *Rosser*, 2 Hem. & M. 190.

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In *Heath* v. *Lewis* (*s*), a testator bequeathed an annuity to a single lady (if living and unmarried at the death of a prior annuitant) " during the term of her natural life, if she shall so long remain unmarried " : it was held by the Lord Justices to be a limitation as distinguished from a condition, and that the annuity ceased when the lady married. No gift over is required in the case of a limitation as distinguished from a condition.

In *Re Moore* (*t*), a testator directed his trustee to pay to his sister M, " during such time as she may live apart from her husband, before my son attains twenty-one years, the sum of £2 10s. per week for her maintenance whilst so living apart from her husband." M and her husband were married some years before the date of the will and never lived apart until some time after the death of the testator. The testator's son was living and an infant. Held that this was a limitation of weekly payments during a specified time, and not a legacy subject to a condition precedent or subsequent, and that the object of the limitation being to induce M to live apart from her husband the gift was void (*u*). But a provision of this nature made by a testator for a married woman who, at the date of the will and at the testator's death, is living apart from her husband, is *prima facie* valid (*x*).

A gift to an unmarried person cannot be construed to mean a gift to that person so long as he shall remain unmarried. Where, therefore, a testator gave all his property to his wife " for the benefit of herself and his unmarried children " so long as she lived, and one child, unmarried at the death, married afterwards in the lifetime of the widow, it was held that such child had not become disqualified from taking under the bequest (*y*).

In *Webb* v. *Grace* (*z*), A. by deed of covenant agreed to pay to E. C. during her life, " subject to the proviso thereinafter contained," an annuity of £40, the proviso being that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to £20 only, which sum should, in such case, be paid and payable to E. C. from the time of her marriage

(*s*) 3 De G. M. & G. 954.

(*t*) 39 Ch. D. 116; and see *Re Hope Johnstone*, [1904] 1 Ch. 470; *Re Wilkinson*, [1926] Ch. 842, 847.

(*u*) And see *Potter* v. *Richards*, 24 L. J. Ch. 488; and cf. *Corbett* v. *C.*, 14 P. D. 9.

(*x*) *Re Charleton*, [1911] W. N., p. 54; *Re Lovell*, [1920] 1 Ch. 122.

(*y*) *Jubber* v. *J.*, 9 Si. 503. See also *Hall* v. *Robertson*, 4 De G. M. & G. 781

(*z*) 2 Ph. 701. See *Jones* v. *J.*, at p. 487, *supra*

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for the remainder of her life. E. C. having married, Lord Cottenham reversing the decision of Shadwell, V.-C. (*a*), held her only to be entitled to the annuity of £20. "The question," said his Lordship, "turns upon the construction of the covenant; for there really cannot be any doubt as to the rule of law. The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. If then, this grant is a grant of £40 per annum until marriage, and, from that event happening, of £20 per annum for life, there can be no doubt but that such a gift is lawful, and that, after marriage, there can be no demand for the £40 per annum. The claim is grounded upon contract and obligation on the part of the grantor; the parties claiming must therefore prove that their claim is within the terms of the contract and obligation. . . . Is there, in the covenant, any contract or obligation to pay £40 per annum after the marriage of E. C.? The argument in favour of the claim assumes that there is an unqualified grant of an annuity of £40 per annum for life, and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts: for there is not any unqualified gift of an annuity of £40 for life; the contract and obligation is, to pay to E. C. during her life, subject to the proviso hereinafter contained, an annuity of £40 at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay £40 per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law. . . . The condition, if there be one, is precedent and not subsequent" (*b*).

Where the object of a devisor appears to be, not to restrain marriage, but to provide for a single woman while she is unmarried, a gift over upon her marriage will take effect, and the question as to whether the clause containing such gift amounts to a condition or a limitation is immaterial, inasmuch as such a distinction does not apply to a devise of realty (*c*).

(*a*) 15 Si. 384. (*b*) Cf. *Re Moore*, *supra*.

(*c*) *Jones* v. *Jones*, 1 Q. B. D. 279; cf. *Bellairs* v. *B.*, 18 Eq. 510, 517; *Re Hewett*, [1918] 1 Ch. 458.

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A testator's will contained a condition that the trustees should not pay over the shares of his sons without taking from them respectively a bond in £20,000 that they would not marry or cohabit with certain of their cousins. Page Wood, V.-C., directed the shares to be paid to the sons without regard to this condition (*d*).

6. As to Consent to Marriage.

In the case of a *condition subsequent*, a marriage in the lifetime of the father, with his consent, or even his subsequent approbation (*e*), is equivalent to a marriage after his death with the consent of trustees (*f*).

A condition in a will requiring the consent of trustees to marriage has been held not to be applicable to the second marriage of a daughter who had married between the date of the will and the death of the testator, and was a widow at his death (*g*).

A condition forfeiting a legacy in the event of the legatee marrying a certain person without the testator's written consent, has been limited to a marriage in the testator's lifetime (*h*).

Courts of equity will consider whether consent may not be inferred from the acts of the persons whose consent is required although no formal consent has been given. Thus, where no particular mode is prescribed for trustees to give their consent, it may be presumed that they have given it where they have allowed courtship and marriage to take place without expressing their dissent (*i*), especially if from any fraudulent or corrupt motive they have withheld actual consent (*k*). And so where a long period has elapsed after the forfeiture and no objection has been taken, assent may be presumed (*l*). And in *Strange* v. *Smith* (*m*), although the *written* consent of the mother was made requisite, Lord Hardwicke held that the mother having made her first offer to the intended husband, received him at her house, encouraged

(*d*) *Poole* v. *Bott*, 11 Ha. 33.

(*e*) *Wheeler* v. *Warner*, 1 S. & S. 304; *Tweedale* v. *T.*, 7 Ch. D. 633; *Re Park*, [1910] 2 Ch. 322.

(*f*) See *Clarke* v. *Berkeley*, 2 Vern. 720; *Parnell* v. *Lyon*, 1 V. & B. 479; *Coventry* v. *Higgins*, 14 Si. 30; *Violett* v. *Brookman*, 5 W. R. 342.

(*g*) *Crommelin* v. *C.*, 3 V. 227; *Hutcheson* v. *Hammond*, 3 Bro. Ch. 128.

(*h*) *Booth* v. *Meyer*, 38 L. T. 125; *Curran* v. *Corbet*, [1897] 1 Ir. R. 343.

(*i*) *Campbell* v. *Lord Netterville*, cited 2 V. 530; 10 V. 243; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225.

(*k*) *Mesgrett* v. *M.*, 2 Vern. 580.

(*l*) *Re Birch*, 17 B. 358; Jarman (6th ed.), 1535.

(*m*) Amb. 263; *Re Brown*, [1904] 1 Ch. 120.

his addresses to her daughter, and treated with him and his father about the settlement, had thereby given her consent (although it does not appear by the report that it was in writing); and that she could not withdraw it. Eldon, C., cites this case in *Clarke* v. *Parker* (*n*), but does not notice that the consent was required to be in writing (*o*). In *Worthington* v. *Evans* (*p*), a letter written by the trustee the day before the wedding (expressing an intention to sign a formal document of consent, which had been already prepared but which was not in fact signed until after the wedding) was held to be a sufficient consent in writing (*q*).

In *Pollock* v. *Croft* (*r*), there was a bequest of personal estate to A, provided she married with the consent of B, but if she married without such consent, then to C; Grant, M.R., held that a general permission given by B after A attained twenty-one, to contract marriage as she might think fit, and subsequent approbation of a marriage contracted under such general permission without his knowledge, was a sufficient compliance with the requisition.

The Court will interfere where the refusal of consent by a trustee is shown to be due to any corrupt or unreasonable cause (*s*). But even if the person who refuses his consent be the devisee over, he is not obliged to show his reason for dissent—it lies upon the party requiring assent to show that it has been unreasonably refused : " for the testator must know that he has made necessary the consent of a person who has an interest " (*t*).

And if a trustee, where consent to a marriage is required, refuse to interfere, either by consenting or objecting to a proposed match, the Court will direct a reference to inquire and state to the Court whether the marriage is a proper one (*u*).

If consent be once obtained, unless by fraud or misrepresentation (*x*), it cannot without a sufficient reason (*y*) be withdrawn,

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(*n*) 19 V. 1.

(*o*) See Jarman (6th ed.), 1535.

(*p*) 1 S. & S. 165.

(*q*) And see *Daley* v. *Desbouverie*, 2 Atk. 261; *Clarke* v. *Parker*, 19 V. 1, 24; *Re Smith*, 44 Ch. D., at p. 659; *D'Aguilar* v. *Drinkwater*, 2 V. & B. 225; *Re Brown*, [1904] 1 Ch. 120.

(*r*) 1 Mer. 181. See also *Mercer* v. *Hall*, 4 Bro. Ch. 228.

(*s*) *Dashwood* v. *Bulkeley*, 10 V., at p. 245; *Clarke* v. *Parker*, 19 V., at p. 18; *Peyton* v. *Bury*, 2 P. W. 628.

(*t*) *Clarke* v. *Parker*, 19 V. 22; Jarman (6th ed.), p. 1537. See, however, the remarks of Lord Hardwicke in *Hervey* v. *Aston*, 1 Atk. 381; and of Lord Mansfield in *Long* v. *Dennis*, 4 Burr. 2052.

(*u*) *Goldsmid* v. *G.*, G. Coop. 225.

(*x*) *Dillon* v. *Harris*, 4 Bligh, 321.

(*y*) *Re Brown*, [1904] 1 Ch. 120.

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especially if the person so withdrawing his consent would derive a benefit from a marriage without consent (*z*).

A conditional consent may be withdrawn upon non-performance of the conditions (*a*); it is in fact not a consent unless the condition be fulfilled.

When the consent of *all* the trustees is required, the consent of two, without the third being consulted, is insufficient, as there is a discretion in him as well as the others (*b*); but the consent of one of the executors or trustees who renounced or never acted, would according to the more recent authorities be unnecessary, the authority of consent being annexed to the office (*c*).

Where the condition has become impossible by all the persons dying whose consent was necessary before marriage, it is discharged (*d*).

But if some only of such persons survive, the consent of such survivors, although only a performance of the condition *cy-près*, will be sufficient. Thus where a legacy is given to a legatee on marriage upon a *condition precedent* requiring the consent of both parents of the legatee, the consent of the surviving parent will be deemed a sufficient compliance with the condition (*e*). *A fortiori* will this doctrine be applicable in the case of *conditions subsequent*. Thus where a legacy was bequeathed to a lady upon condition of her marrying with the consent of *two* persons who were also executors; on the death of one of them, the condition being subsequent and become impossible, she might marry without the consent of the survivor (*f*).

Where, however, the consent of a class of persons as guardians is required, whose temporary non-existence could be easily replaced by an application to the Court, a marriage during the non-existence of guardians and consequently without consent, will prevent the

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(*z*) *Strange* v. *Smith*, Amb. 263; *Merry* v. *Ryves*, 1 Eden, 1; *Le Jeune* v. *Budd*, 6 Si. 441.

(*a*) *Dashwood* v. *Bulkeley*, 10 V. 230; *D'Aguilar* v. *Drinkwater*, 2 V. & B 225.

(*b*) *Clarke* v. *Parker*, 19 V. 1.

(*c*) See *Clarke* v. *Parker*, *supra*; *Worthington* v. *Evans*, 1 S. & S. 165; *Boyce* v. *Corbally*, Ll. & G., 102; *Ewing* v. *Addison*, 7 W. R. 23; *White* v. *M'Dermott*, 7 Ir. R. C. L. 4; cf. *Crawford* v. *Forshaw*, [1891] 2 Ch. 261; *Re Smith*, [1904] 1 Ch. 139; *Re Bacon*, [1907] 1 Ch. 475.

(*d*) *Per* Lord Hardwicke in *Graydon* v. *Hicks*, 2 Atk. 16; *Jones* v. *Suffolk*, 1 Bro. Ch. 528; *Aislabie* v. *Rice*, 3 Madd. 256; *Grant* v. *Dyer*, 2 Dow, 93; *Collett* v. *C.*, 35 B. 312.

(*e*) *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753.

(*f*) *Peyton* v. *Bury*, 2 P. W. 626; but see *Jones* v. *Suffolk*, 1 Bro. Ch. 529.

vesting of a legacy given upon their consent (*g*); and the purported appointment of a guardian by the infant himself would not be sufficient (*h*).

The subsequent approbation of persons whose consent is necessary to a marriage is not generally sufficient, because it cannot amount to a performance of a condition, or dispense with a breach of it (*i*).

In *Burleton* v. *Humphrey* (*k*), the marriage was to be with "the consent or approbation" of a trustee, who did not give his approbation until a month after the marriage: Hardwicke, C., distinguished between consent and approbation, and inclined to the opinion that the subsequent approbation would do. See, however, the remarks of Eldon, C., in *Clarke* v. *Parker* (*l*).

Where a legacy is to vest or be paid at a particular age, and then there is a clause of forfeiture on marriage without consent, such clause will be construed as having relation to a marriage under the specified age: and a marriage subsequent thereto without consent is no forfeiture (*m*). So where a bequest was made in trust for A his heirs and executors *when and as soon as he attained twenty-one, or married before that age with consent of guardians*, but if he should not attain twenty-one or marry without such consent, then over, Grant, M.R., held that on attaining twenty-one, A was absolutely entitled, although he had *previously* married without consent (*n*).

Where, however, there was a bequest to A to be *paid at twenty-one or marriage*, but if A died under twenty-one or married without consent of B, then over, and A married under twenty-one without consent, it was held by Hardwicke, C., that a forfeiture had taken place (*o*). In the former class of cases it will be observed that the legacy given on a condition *precedent* vests, if either of the two contingencies happen. On the other hand, in the latter class the legacy given on a condition *subsequent* determines if either of these happens.

(*g*) *Re Brown's Will, etc.*, 18 Ch. D. 61.

(*h*) 18 Ch. D. 61, 72.

(*i*) *Reynish* v. *Martin*, 3 Atk. 330; *Fry* v. *Porter*, 1 Ch. Cas. 138; 1 Mod. 300.

(*k*) Amb. 286.

(*l*) 19 V. 21.

(*m*) *Lloyd* v. *Branton*, 3 Mer. 116; *Osborn* v. *Brown*, 5 V. 527; *Knapp* v. *Noyes*, Ambl. 662; *Duggan* v. *Kelly*, 10 Ir. Eq. R. 473.

(*n*) *Rusten* v. *Halsey*, 13 V. 125; *Knight* v. *Cameron*, 14 V. 389; cf. *Peyton* v. *Bury*, 2 P. W. 626; *Dawson* v. *Oliver-Massey*, 2 Ch. D. 753, 760.

(*o*) *Chauncy* v. *Graydon*, 2 Atk. 616.

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The Court may relieve against forfeiture occasioned by the negligence of a trustee. Thus, in *O'Callaghan* v. *Cooper* (*p*), a trust term was limited to trustees, to raise out of real estate portions for daughters, to be paid on marriage upon condition that they should be married with consent of their mother, or, after her death, of the trustees, and that the husband should previously make a settlement. A marriage having taken place with the consent of the mother and the privity of the trustee, but by the neglect of the trustee, without any settlement, the Court, on a settlement being made, relieved against the forfeiture.

A testator's consent to a marriage to take place *after his death*, does not dispense with a condition of forfeiture annexed to a bequest in his will that the legatee shall forfeit the same in case he marry without the consent of persons named in the will (*q*). Where a testator bequeaths the income of a fund to be paid to his daughter "for her life or until her marriage," and the daughter marries with the testator's consent after the date of the will, she can claim nothing under the bequest (*r*).

But where the testator has not made the consent of *other* persons requisite, the question may arise, when he has imposed any condition with respect either to the time of marriage, or against marriage with a particular person, how far by *his own consent* to the marriage he will be held to have dispensed with the condition, and it seems that where the condition is *subsequent*, the consent of the person who imposed the condition will remove the consequence of its non-performance. Thus, in *Smith* v. *Cowdery* (*s*), a testator bequeathed his residuary personal estate unto his executors upon trust to pay and divide the same equally among his children Susannah, Mary, Ann, Fanny, and William, when they should respectively attain twenty-one, or on the day of marriage, the interest in the meantime to be applied for their maintenance, "except his daughter Mary, whose share the testator directed should be paid to her upon the day of her intermarriage with any other person *excepting H. T.*, and the interest in the meantime to be applied for her maintenance"; and the testator directed that "in case his daughter Mary should at any time thereafter intermarry with H. T.,

(*p*) 5 V. 117.
(*q*) *Lowry* v. *Patterson*, 8 Ir. R. Eq. 372.
(*r*) *Bullock* v. *Bennett*, 7 De G. M. & G. 283; *West* v. *Kerr*, 6 Ir. Jur. 141; *Cooper* v. *C.*, 6 Ir. Ch. R. 217.
(*s*) 2 S. & S. 358.

then upon trust to pay and divide her share of the residue of his personal estate," unto and amongst his other children. The testator died on June 1, 1795, but his daughter had during the testator's lifetime, and with his consent, married H. T. Leach, V.-C., held that Mary was entitled to her legacy. "The testator," said his Honour, "introduces a condition in his will to prevent the marriage of his daughter Mary with H. T. After the making of his will, his daughter married H. T. with his express consent and approbation; and the condition is thus dispensed with. In coming to this conclusion I follow the cases of *Clarke* v. *Berkeley* (*t*), *Crommelin* v. *C.* (*u*), and *Parnell* v. *Lyon*" (*x*).

But the consent of the testator will not dispense with a condition precedent, that is to say where the performance of the condition is necessary before any interest is taken by the intended legatee or devisee (*y*).

As to whether conditions requiring marriage with consent are broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent, seems to be somewhat doubtful. In *Stackpole* v. *Beaumont* (*z*), where a legacy was given by a testator to his daughter, payable upon her marriage, if before twenty-one, with consent of trustees, the legatee having married before twenty-one, and without consent, Loughborough, C., held that the legacy was not then payable. Afterwards, having attained twenty-one, she married a second husband, and claimed the legacy, but Leach, M.R., thought himself bound by Lord Loughborough's decision from deciding in her favour (*a*). The point, however, raised before Leach, V.-C., was not decided by Loughborough, C., and Leach, V.-C.'s, judgment has been doubted (*b*). In *Randal* v. *Payne* (*c*), there was a bequest to J. and M., in case they married into certain families, and if they should not marry then over. Upon their marrying into other families, Lord Thurlow (without suggesting that any forfeiture had thereby taken place) held that marriage with certain families being a condition precedent

(*t*) 2 Vern. 729.

(*u*) 3 Ves. 227.

(*x*) 1 V. & B. 479; see *Violett* v. *Brookman*, 26 L. J. Ch. 308; *Re Park*, [1910] 2 Ch. 322.

(*y*) *Bullock* v. *Bennett*, 7 De G. M. & G. 283; *Younge* v. *Furse*, 8 De G. M. & G. 756; *West* v. *Kerr*, 6 Ir. Jur. 141; *Davis* v. *Angel*, 31 B. 223.

(*z*) 3 V. 89.

(*a*) *Clifford* v. *Beaumont*, 4 Russ. 325.

(*b*) *Beaumont* v. *Squire*, 17 Q. B. 905; *Davis* v. *Angel*, 31 B. 223; Theobald (8th ed.), p. 641.

(*c*) 1 Bro. Ch. 55.

nothing could vest until it had taken place, and that they had their whole lives for the performance of the condition (*d*).

In *Lowe* v. *Manners* (*e*), however, a devise, subject to a similar condition, was held to be at once forfeited by marriage into another family. This case, however, is distinguishable from *Randal* v. *Payne* by the circumstance that, in *Lowe* v. *Manners*, from the day of marriage into another family each daughter was to be entitled to a fortune substituted for that given in the event of her husband having been one of the favoured families, thereby showing that the choice was only once tendered to her.

Where a condition against marriage was broken by a widow, who concealed her second marriage, her husband, who was aware of the condition, was held bound to *refund the income* which trustees had paid to her in ignorance of the marriage (*f*).

Persons will not be permitted to allow a long time to elapse without making any claim, and then to insist on a forfeiture and throw on the persons entitled the burden of proving that there has been none (*g*).

Ignorance of a condition annexed to a gift by will may not protect the devisee or legatee from the consequences of not complying with the condition (*h*), except where the devisee in such case is also heir-at-law of the devisor, for it has been expressly decided that neither neglect nor refusal to comply with a condition will subject an heir-at-law to the loss of an estate unless he has notice of the condition (*i*).

In *Re Greenwood* (*k*) a testator, who died in 1853, devised his real estate upon trust for his daughter for life, and after her death for her children; and if she should have no child he devised his real estate to N. in fee, on condition that in case the testator's wife should be then living she should have the use for the then remainder of her life of the testator's residence, and on further condition that N. should "take and use" the testator's name only, but subject to the payment of certain legacies which the testator bequeathed only if his daughter should have no child, and which should be

(*d*) See *Duddy* v. *Gresham*, 2 L. R. Ir. 442; Theobald (8th ed.), p. 641.
(*e*) 5 B. & Ald. 917.
(*f*) *Charlton* v. *Coombes*, 4 Gif. 382; cf. *Preece* v. *Searle*, 3 Jur. (N.S.) 711.
(*g*) *Re Birch*, 17 B. 358, in which case 28 years elapsed.
(*h*) *Porter* v. *Fry*, Vent. 199; *Re Hodges' Legacy*, 16 Eq. 92; *Astley* v. *Essex*, 18 Eq. 290; and see *Re Quintin Dick*, [1926] Ch. 992.
(*i*) *Doe* d. *Kenrick* v. *Beauclerk*, 11 East, 657, 667; *Doe* d. *Taylor* v. *Crisp*, 8 A. & E. 779; *Murphy* v. *Broder*, 9 Ir. R. C. L. 123.
(*k*) [1903] 1 Ch. 749.

payable at her death exclusively out of the estates devised to N. The testator's daughter and N. both survived the testator, but his wife was dead. The daughter, who was now in her fifty-ninth year, was married, but had had no children. N. died in her lifetime intestate. It was held upon the construction of the will that the condition requiring N. to take and use the testator's name was a condition subsequent, that is, a condition to operate only upon N. becoming entitled to the possession of the estate by the death of the daughter without children, and not before; and that as he had been prevented from performing it by the act of God, the estate would, on the death of the daughter without children, vest absolutely in his legal personal representative freed from the condition.

If a condition attached to a devise is capable of being construed either as a condition precedent or as a condition subsequent, the Court will prefer the latter construction.

7. Contract in Restraint of Marriage, or in Fraud of the Marriage Contract.

Certain agreements are treated as against public policy either as tending to impede freedom of consent and to introduce unfit and extraneous motives into the contracting of particular marriages, or as tending to hinder marriage in general (*l*).

But where a contract is divisible, one alternative which is valid will not be rendered invalid by another alternative which is void, as being in restraint of marriage. Thus in *Robinson* v. *Ommanney* (*m*), an unmarried woman, having a power of appointing a sum of money by will, made a will appointing it to a mortgagee and covenanted not to cancel, revoke, or annul the will. She afterwards became bankrupt, and obtained her discharge, and after her discharge she revoked her will, and made another appointing the sum of money to another person. The Court of Appeal, affirming the decision of Kay, J. (*n*), held, that the covenant not to revoke the will was divisible, and was not wholly void, although in *one alternative it was in restraint of marriage.*

A contract to marry a particular person, when that person is not bound by corresponding obligation, will be cancelled: "it being

(*l*) Pollock, Contracts (9th ed.), p. 421; *Baker* v. *White*, 2 Vern. 215.
(*m*) 23 Ch. D. 285.
(*n*) 21 Ch. D. 780.

contrary to the nature and design of marriage, which ought to proceed from a free choice, and not from any compulsion " (*o*).

A contract by which persons were mutually bound to marry each other has been held valid at law (*p*). But although the contract may have been mutual and valid at law a Court of Equity has relieved against it, if it was a fraud upon a parent or a person *in loco parentis* from whom expectations were entertained; thus, a bond given to her suitor by a daughter, the father having forbidden her to see or encourage him, was, on the application of the daughter, set aside after the death of her father on the ground that had the father known of the bond and that the daughter had not submitted to his opinion about the match, he might probably have made other provisions for his daughter in his will, and that the transaction was therefore a fraud upon the father. This decision was given although mutual bonds had been exchanged between the daughter and her suitor (*q*).

A covenant to pay a woman a sum of money as long as she continues sole and unmarried is not illegal (*r*).

In another respect our Courts have not followed the civil law, by which *proxenetæ* of the Roman Law, or matchmakers, were allowed to stipulate for a reward not exceeding a certain amount, for promoting marriages; for it has been held in equity, from a very early period, that all contracts or agreements for promoting marriages for reward (usually termed marriage brokage contracts) are utterly void (*s*).

The vice of such a consideration was afterwards pleadable at law (*t*).

And so far has the principle been carried that Lord Redesdale declared a bond void which was given as a remuneration to the obligee for having assisted the obligor in effecting an elopement and marriage without the consent of the wife's friends, although it was given voluntarily after marriage, and without any previous agree-

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(*o*) *Key* v. *Bradshaw*, 2 Vern. 102; and see *Woodhouse* v. *Shepley*, 2 Atk. 535; *Lowe* v. *Peers*, 4 Burr. 2225; *Cock* v. *Richards*, 10 V. 429; *Hartley* v. *Rice*, 10 East, 22.

(*p*) See *Cock* v. *Richards*, 10 V. 438, 439; and *Atkins* v. *Farr*, 1 Atk. 287; *S. C.*, 2 Eq. Ca. Abr. 247.

(*q*) *Woodhouse* v. *Shepley*, 2 Atk. 535.

(*r*) *Gibson* v. *Dickie*, 3 M. & S. 463.

(*s*) *Roberts* v. *R.*, 3 P. W. 76; *Heap* v. *Marris*, 2 Q. B. D. 630; *Chesterfield* v. *Janssen* and notes thereto, *ante*; *Law* v. *L.*, Cas. t. Talb. 142; *Hall* v. *Potter*, 1 Eq. Ca. Abr. 89, pl. 3; 3 Lev. 411.

(*t*) *Collins* v. *Blantern*, 2 Wils. 347.

ment for the same (*u*). Whether the contract be to procure for reward the marriage of X with another specified person or to introduce to X persons of the opposite sex with a view to a marriage between X and one of them is immaterial; in each case the contract is illegal (*x*).

The fact of the match being an equal or proper one will not render a marriage brokage contract valid (*y*); and such contract being contrary to public policy, is not capable of confirmation (*z*); and money paid pursuant to such contract has been recovered back in equity (*a*).

Upon the same principle, every contract by which a parent or guardian obtains any security for promoting or consenting to the marriage of his child or ward is void (*b*). So, in *Duke of Hamilton* v. *Lord Mohun* (*c*), the mother being guardian, on the marriage of her daughter insisted upon having from the intended husband a bond, in a penalty that he would give her a release of all accounts as guardian, within two years after the marriage. The bond was set aside, as the case was in the nature and within the reason of marriage brokage bonds, and there was no difference between giving a bond for procuring a marriage, and a bond to release part of what became due.

Upon similar grounds, all contracts upon a treaty for a marriage, tending to deceive or mislead one of the parties to it, or their relatives, will be held void. Thus a security given by a son without the privity of his parents, who provided for him on his marriage, to return part of the portion of his wife, is void (*d*). So where, upon a marriage, a settlement was agreed to be made of certain property, by relations on each side, and after the marriage one of the parties procured an underhand agreement from the husband to defeat the settlement, it was set aside, and the original agreement carried into effect (*e*).

(*u*) *Williamson* v. *Gihon*, 2 S. & L. 357, 362.

(*x*) *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123 (C. A.); reversing [1905] 1 K. B. 24.

(*y*) *Cole* v. *Gibson*, 1 Ves. Sen. 506.

(*z*) *Cole* v. *Gibson*, 1 Ves. Sen. 503, 506, 507; *Roberts* v. *R.*, 3 P. W. 74, and Cox's note (1).

(*a*) *Smith* v. *Bruning*, 2 Vern. 392; *S. C.*, *Goldsmith* v. *Bruning*, 1 Eq. Ca. Abr. 89, pl. 4; *Hermann* v. *Charlesworth*, [1905] 2 K. B. 123.

(*b*) *Keat* v. *Allen*, 2 Vern. 588; *S. C.*, Pr. Ch. 267.

(*c*) 2 Vern. 652; Gilb. Eq. R. 297.

(*d*) *Turton* v. *Benson*, 1 P. W. 496; and see *Kemp* v. *Coleman*, Salk. 156.

(*e*) *Peyton* v. *Bladwell*, 1 Vern. 240; *Stribblehill* v. *Brett*, 2 Vern. 445; *S. C.*, Pr. Ch. 165.

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So, where a man, on the treaty for the marriage of his sister, let her have money, privately, in order that her portion might appear as large as was insisted on by the intended husband, and she gave a bond to her brother for the repayment of it, it was decreed to be delivered up (*f*). So, where a father, having, upon the marriage of his son, made a settlement of an annuity upon the wife in full for her jointure, and in lieu of dower, the son, privately, without the knowledge of his intended wife or her father, gave a bond to indemnify his father against the annuity or rentcharge, the bond was held void by Sir W. Grant, M.R., as a fraud upon the faith of the marriage contract (*g*).

Relief will be granted in such transactions, although the party to the marriage seeking it be *particeps criminis;* thus, in *Redman* v. *R.* (*h*), upon a treaty of marriage between A and the daughter of B, B would not consent to the marriage, because A owed £200 to C. A's brother thereupon gave his bond to secure the debt, and A's bond was cancelled; A, however, without the knowledge of B, but with the privity of his daughter, gave a counter-bond to his brother. Upon A's death, it was held that the wife, though a party to the fraud, might set aside the bond; and the Lord Chancellor said that if A had been alive, and a party, he might also have been relieved.

The principle upon which this class of cases proceeds was much discussed in the case of *Neville* v. *Wilkinson* (*i*). There Mr. Neville, being about to marry, inquiry was made by the lady's father to what extent he was indebted. Wilkinson, who was applied to, at the desire of Neville concealed a demand which he had against him; after the marriage he attempted to recover it, and a bill was filed by Mr. Neville to restrain him. Lord Thurlow held that Wilkinson, having made a misrepresentation, a Court of Equity must hold him to it; observing that the principle on which such cases had been decided was, "that faith in such contracts was so essential to the happiness both of the parties and children, that whoever treats fraudulently on such an occasion, shall not only not gain, but even lose by it" (*k*).

But equity will not interfere if another equally innocent person

(*f*) *Gale* v. *Lindo*, 1 Vern. 475; and see *Lamlee* v. *Hanman*, 2 Vern. 499.
(*g*) *Palmer* v. *Neave*, 11 V. 165.
(*h*) 1 Vern. 343.
(*i*) 1 Bro. Ch. 543.
(*k*) Approved, *Jorden* v. *Money*, 5 H. L. C. 185, at p. 210. And see *Scott* v. *S.*, 1 Cox, 366; *Shirley* v. *Ferrers*, cited 11 V. 536; *The Vauxhall Bridge Company* v. *The Earl of Spencer*, Jac. 67; *Evans* v. *Wyatt*, 31 B. 217, 222.

would thereby be injured. Thus, in *Roberts* v. *R.* (*l*), A treated for the marriage of his son, and in the settlement on the son there was a power reserved to the father to jointure any wife whom he should marry in £200 per annum, he paying, or securing the payment of, £1,000 to the son. The father treating about marrying a second wife, the son, pursuant to an agreement with the second wife's relations, released the £1,000, but at or soon after the marriage took a new bond from his father, without the privity of the second wife or her relations. Upon a bill being filed by the father, Sir Joseph Jekyll, M.R., refused to set aside the bond given to the son, observing that, whatever arguments could be made use of in favour of the father's second wife or of the father, to prove that he ought to be discharged of the bond for payment of the £1,000, the very same arguments might be urged on behalf of the son and his wife, to prove that it ought to be paid, and as the agreement on the son's marriage was first, it ought to have the preference.

8. As to Conditions annexed to Gifts for the purpose of effecting the Separation of Husband and Wife.

Upon principles of public policy it has been held, that where bequests are made to married women upon condition of their living separate from their husbands, the condition is void, being considered *pro non scripto*, but the bequest will be good (*m*).

This principle is not applicable where the bequest is of such a nature as not to influence the conduct of the husband and wife, and the bequest to the husband or wife living apart from each other is not of an annuity but of a capital sum and to take effect immediately on the death of the testator. In *Shewell* v. *Dwarris* (*n*), a testatrix made a bequest of a moiety of her residuary personal estate to her nephew, provided and on the express condition that he should be residing with his then present wife, if she should be living at the time of the testatrix's decease, but in case they should not at that time be living together as man and wife, then (subject as aforesaid) she gave and bequeathed one half of such moiety of the said residue unto the wife absolutely and the other half part thereof to the

(*l*) 3 P. W. 65. See the remarks on this case in *Lee* v. *Hayes*, 17 Ir. C. L. R. 394.

(*m*) *Tennant* v. *Brail*, Toth 141; *Brown* v. *Peck*, 1 Eden, 140; *Wren* v. *Bradley*, 2 De G. & Sm. 49; Theobald (8th ed.), p. 639. As to a limitation to the same effect, see *Re Moore*, p. 491, *supra*.

(*n*) Johns. 172; Theobald, *supra*.

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husband. It was held that the bequest was good notwithstanding the rule which avoids gifts providing for a future separation. " Here the gift is by will," said Page Wood, V.-C., " and merely provides for either contingency, namely, that of the husband and wife living together or separate at the moment when the will must take effect, namely, at the death of the testatrix. The bequest cannot influence their conduct, but takes effect immediately on the death, according to the then state of facts " (*o*).

As to separations effected between husband and wife by their mutual consent, see the note to *Stapilton* v. *S.*, *post.*

(*o*) See *Re Lovell*, [1920] 1 Ch. 122.

JOHN WRIGHT HENNIKER WILSON, Esq., Appellant, *v.* MARY WRIGHT HENNIKER WILSON (the Appellant's Wife) and Others, Respondents.

1848. 1 H. L. Cas. 538; 5 H. L. Cas. 40.

Husband and Wife. Articles of Separation. Specific Performance. Jurisdiction.

The Court of Chancery exercises only its ordinary jurisdiction in giving effect to articles of separation between husband and wife, so far as they regard an arrangement of property agreed upon.

The Court, in decreeing specific performance of such articles, does not inquire into the cause of the separation.

The stopping of a suit in the Ecclesiastical Court for nullity of marriage, on the ground of impotency of the husband, is a sufficient consideration to him for articles of separation; and so, it seems, is a covenant by a third party to pay his debts.

Semble, that the Court, after decreeing specific performance of the articles, may restrain the wife, as well as the husband, from proceeding in the suit for nullity (*a*).

This was an appeal against a decree for specific performance of articles of separation between the appellant and his wife, the respondent. They were married in April, 1839. Differences arose between them soon after the marriage, and continued until May, 1843, when Mrs. Wilson, by advice of her friends, went to reside at the house of Mr. Foster, her solicitor. On the 8th of that month the appellant was served with a citation from the Consistory Court of London, in a suit for nullity of marriage by reason of impotency. The appellant called next day on Mr. Foster, expressed his anxiety to stop the suit, and to enter into an amicable arrangement for a separation; and proposed to execute a proper deed for that purpose, and to give up the interests which he took in his wife's property under their marriage settlement, and in virtue of his marital rights, in consideration of an annuity of £1,500.

(*a*) 1 H. L. Cas. 556, 575, and *infra*, p. 520.

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By the settlement executed previous to the marriage, a freehold estate in the county of Southampton, called Drayton Lodge, of the value of £2,000 a year, to which Mrs. Wilson was entitled for her life, for her separate use, with remainder to her issue, under the will of Lady Frances Wilson, was secured to the same use, together with £3,000 Consols, part of her own funds; and a leasehold house and premises, called the Chelsea Park estate, which, with the land tax charged thereon, she had purchased some time before the marriage, were settled to the use of the appellant during their joint lives, and to her, for her life, if she survived him, with remainder of the term absolutely to the appellant, his executors and assigns. The rest of the respondent's property—consisting of freehold estates in the counties of York and Essex, worth together about £3,000 a year, devised to her by Sir Henry Wilson for her life, with remainder to her issue, with other remainders over; of a leasehold house in Grosvenor Place, in the county of Middlesex, bequeathed to her by the same will, and also of considerable sums of money in the public funds, in bank and on mortgage, and other personal estate of large amount—was not included in the settlement, and therefore, after the solemnisation of the marriage, belonged, as the settlement recited, to the appellant in his marital right (*b*).

The appellant was informed, on May 13, that the terms of separation which he proposed to Mr. Foster would not be accepted, and that it was determined by Mrs. Wilson and her advisers to proceed with the suit in the Consistory Court. A notice to that effect was sent on May 25 to the appellant, who, on the next day, called again on Mr. Foster, and was informed that the libel in that suit would be filed on June 2 then next ensuing, unless an arrangement was completed in the meantime. * * * Eventually Mr. Wilson submitted to the terms proposed, and wrote and signed this memorandum: "The annual sum agreed upon on the part of Mrs. W. H. Wilson, to be paid to Mr. W. H. Wilson under the deed of separation, to be executed immediately, is £1,000. The deed made to carry into effect the terms proposed in a memorandum dated May 26, 1843, signed by

(*b*) See 14 Si. 405.

Mr. H. Wilson, and to be a bar to suits; suit now pending to be withdrawn on the mutual execution of the agreement."

Articles of agreement for separation were immediately prepared, and the appellant—having before refused to appoint a solicitor, as being himself a barrister, and competent to conduct the negotiation—perused the draft and suggested alterations in it, and perused it again after it was finally settled on behalf of the respondent, and he assisted also in examining the engrossment.

The articles so prepared, dated June 1, 1843, and made between the appellant of the first part, the respondent, his wife, of the second part, and Nathan Wetherell, Esq., of Lincoln's Inn, and the said Mr. Foster, of the third part—after reciting that unhappy differences having arisen between the appellant and his wife, they had agreed to live separate, and to enter into the arrangements after-mentioned—witnessed that the appellant on the one part, and the said N. Wetherell and W. C. Foster on the other part, with the privity and approbation of Mrs. Wilson, mutually covenanted and agreed to the effect following:—

First, That the appellant should at all times thereafter permit Mrs. Wilson to live separate and apart from him, etc.

* * * * * * *

Seventhly, That, if and so long as the appellant should duly observe and perform the said covenants and agreements, all the rents, taxes, and other outgoings in respect of the said several estates, and all expenses of repairs upon the same, should, after June 24, be paid by Mrs. Wilson during her life, and "that he, the said John Wright Henniker Wilson, his heirs, executors, and administrators, and his and their estates and effects should be indemnified therefrom, and from all the present debts and liabilities of the said John Wright Henniker Wilson, by the joint and several covenant of the said N. Wetherell and W. C. Foster."

Eighthly, That, if and so long as the appellant should duly observe and perform the covenants and agreements herein contained, a clear annuity of £1,000, commencing from June 24, should be paid to him by equal half-yearly portions, during the joint lives of himself and Mrs. Wilson, the said annuity to be

charged on the freehold estates in the county of York, which belonged to Mrs. Wilson before her marriage.

Ninthly, That a proper deed or deeds for effectuating the objects of the articles should, with all convenient speed, be executed by all the parties to these presents, "such deed or deeds containing all such covenants and provisions as should be deemed expedient," to be settled on behalf of all parties by counsel; and that in case of any unnecessary delay in the execution of such deed or deeds by any of the parties, the other of them should be at liberty to make void these presents.

And lastly, That, upon the execution of these presents by the appellant, the proceedings instituted against him in the Ecclesiastical Court by Mrs. Wilson should be suspended, and upon the execution of the deed or deeds to be so prepared as aforesaid, should be put an end to and withdrawn, but nevertheless without prejudice to Mrs. Wilson's right to institute any other proceedings against him, in case he should make default in the performance of any of these covenants and agreements.

These articles were executed by all the parties to them, and the proceedings in the suit, in the Consistory Court, were suspended.

The appellant having at first interposed some delay in quitting Chelsea Park, in compliance with the articles, soon afterwards, in the course of a correspondence with Mr. Foster, objected to them altogether, on various grounds hereinafter mentioned.

In August, 1843, Mrs. Wilson, by her next friend, and Messrs. Wetherell and Foster, filed their bill against the appellant, stating, among other things, that they, with the view of carrying the said articles into effect, had caused a proper deed to be prepared as thereby provided; that a clerical error occurred in the copying of the original draft of the 7th article, which mentioned that the appellant should be indemnified against his own debts instead of his wife's, as was intended, and that they caused to be substituted in the said deed the usual covenant for indemnifying the appellant against the debts and liabilities of his wife. The bill prayed that, subject to the correction of the said error, the appellant might be decreed to execute the deed

so prepared for carrying the articles into effect, according to their true intent and meaning.

The appellant, in his answer, stated the various grounds on which he objected to perform the articles: that they were procured from him by intimidation, duress, and surprise; that he agreed to them from an apprehension of degradation and ridicule, by the exhibition against him of a charge of impotency, which was false, as Mrs. Wilson well knew; that in making the proposals of May 26 and 31, and in executing the articles, he acted not only without due advice, but also under mental incapacity to contract, arising from apprehension of publicity being given to the said calumnious charge, and that Mrs. Wilson and her advisers instituted the suit in the Ecclesiastical Court, and took advantage of his alarm and apprehension to coerce him into the arrangement; that her sole object was to obtain from him some concessions of property which he acquired under the marriage articles, or his marital rights, for which purpose she had previously threatened him with a divorce upon equally false charges of adultery and cruelty; and the suit for nullity of the marriage by reason of impotency, was another contrivance and device resorted to by her for the same purpose, without any belief in the imputation. He also insisted that the articles differed materially, to his prejudice, from his said proposals, and the draft deed prepared for his execution by the respondents, was itself a deviation from the articles, which did not contain any such clerical error as they alleged; that the suit instituted in the Consistory Court, although suspended, might still be prosecuted by Mrs. Wilson, notwithstanding the articles, so that he had no benefit or protection from the articles in that respect: but he repudiated such benefit, and stated that he would compel her to proceed in that suit, so as to give him an opportunity of refuting the false charge of impotency. He submitted that the articles, not being deliberately entered into by him, nor fairly, but fraudulently, obtained from him, were not binding on him; and as the respondents, Messrs. Wetherell and Foster, did not offer to perform their covenant to pay his debts, exceeding £6,000, the articles were without any consideration to him, inasmuch as the covenant which they proposed to insert in the deed to indemnify him

against Mrs. Wilson's debts was never desired or contemplated by him, knowing from her habits, and possessed as she was of large property, that she would not incur debts.

The appellant's proctor took a proceeding in the Consistory Court, to compel Mrs. Wilson to file her libel there. Her proctor obtained time to do so, and then she and the other respondents filed a supplemental bill in Chancery for an injunction to restrain the appellant from taking further proceedings to compel her to continue the said suit, or to dismiss it; and such injunction was issued, but was discharged upon the appellant's answer being put in.

In May, 1844, the appellant filed a cross bill, stating the contents of his answers to the original and supplemental bills, and that he had consummated the marriage, and charging that Mrs. Wilson admitted his competency, and that her imputation of his impotency would appear to be unfounded if she would proceed to proofs in the suit in the Consistory Court, to which he endeavoured to compel her; but she avoided the prosecution thereof, well knowing that she could not succeed therein. The cross bill prayed that the articles might be declared void, and be delivered up to be cancelled.

Mrs. Wilson in her answer repeated her denial that the marriage was ever consummated, and added that, to the best of her belief, it was not consummated by reason of the impotency or physical inability of the appellant, owing to some malconformation, etc. And she denied that the suit in the Consistory Court was instituted for such purposes as were alleged in the cross bill, but *bona fide* to obtain a sentence of nullity of marriage, to which she and her legal advisers, including eminent counsel and civilians, conceived her to be entitled; and she denied that she ever admitted to any person the appellant's competency.

The causes were heard by the Vice-Chancellor of England, in January and February, 1845, when his Honour rejected certain evidence proposed to be read on behalf of the appellant, * * and declared that, although the covenant contained in the seventh article, to indemnify the appellant against his own debts, instead of his wife's, was an error committed by the convey-

ancer's clerk in copying the original draft of the articles, it could not be considered an error as between the appellant and the other parties; and as they had offered to covenant to indemnify him against his wife's debts, his Honour decreed that it be referred to the Master to settle a proper deed of conveyance for carrying into effect the articles of separation, and that he should insert therein a joint and several covenant by the respondents, Messrs. Wetherell and Foster, with the appellant, to indemnify him against all debts and liabilities of Mrs. Wilson which existed on June 1, 1843, and all her subsequent and future debts and liabilities. [An order was made for the delivery up of the mansion at Chelsea Park by the appellant, and inquiries and accounts were directed. And it was ordered that an injunction should be awarded to restrain the appellant], until after execution of the said deed, from taking any proceedings in the suit instituted by Mrs. Wilson in the Consistory Court, for the purpose of compelling her to proceed therein, and from applying for any order of the said Court for the purpose of dismissing such suit, or otherwise putting an end to it, or whereby the respondents might be made liable for the costs thereof. [And that the bill, in the cross cause, be dismissed with costs.]

The appeal was against the whole decree.

Sir Fitzroy Kelly and Mr. G. Turner (Mr. Busk and Mr. Henniker being with them), for the appellant.

[The arguments used by the appellant's counsel sufficiently appear from the report below of the arguments used on behalf of the respondents.]

Mr. Bethell and Mr. Lloyd, for the respondents.—The arguments for the appellant have stirred up questions of law which have been long considered as settled. Upon all general principles now established and recognised in numerous decisions, not only of the Courts of law and equity, but also of this House, these articles are not open to any of the objections raised against them. The agreement was not, as alleged, for a future or prospective separation; these parties had lived in a manner separate for a considerable time, though the actual separation is to be dated only from the day on which Mrs. Wilson took up her

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residence at the house of her solicitor, which, however, was prior to the execution of the articles. One can easily understand the feelings of delicacy which prevented her from making an earlier disclosure of the appellant's impotency. That charge was the ground of the suit in the Consistory Court, and the articles were founded on a compromise of that suit. The appellant alleges in all his pleadings that the charge is false, but he does not swear that he consummated the marriage; he says in the cross bill that it was consummated, but Mrs. Wilson, in her answer, denies it, in the most solemn and circumstantial manner, and reasserts the charge of his inability to consummate it.

They then dealt with the various pretences set up by the appellant against the validity of the articles, alleging that they were obtained from him by "conspiracy and intimidation"; by "fraud and falsehood" as to the grounds of the suit; by the "influence of fear, and apprehension of publicity, and consequent ridicule and degradation"; by "surprise" and "under mental incapacity to contract, and want of professional advice." * * *

Then as to the appellant's objections to the legal validity of the articles. The first was that all agreements for separation of husband and wife are contrary to public policy, to the policy of marriage, and to moral duty; and that to enforce them in equity or at law is an invasion of the jurisdiction of the Ecclesiastical Courts; but the Judges, whose doubts and *dicta* were cited in support of this objection, gave effect to such agreements in some of the cases that were referred to. [They cited *Legard* v. *Johnson* (*c*), *Fletcher* v. *F.* (*d*), *Worrall* v. *Jacob* (*e*), *Bateman* v. *The Countess of Ross* (*f*), *Tovey* v. *Lindsay* (*g*).] * * * There is no case in which it has been said that a Court of equity is decreeing a separation of husband and wife, when it decrees performance of the husband's covenants in such deeds, over which it only exercises the same jurisdiction that it does on other executory agreements. There are, however, some classes of cases in which neither Courts of law nor equity will interfere in enforcing articles, as where they are made in contemplation

(*c*) 3 V. 352.
(*d*) 2 Cox, 99.
(*e*) 3 Mer. 268.
(*f*) 1 Dow, 235.
(*g*) *Id.* 117.

of a future separation: *Durant* v. *D.* (*h*), *Durant* v. *Titley* (*i*), *Westmeath* v. *W.* (*k*), *Hindley* v. *Westmeath* (*l*); or in fraud of creditors: *Hobbs* v. *Hull* (*m*), *Legard* v. *Johnson* (*n*); or where an end is put to the separation by voluntary reconciliation, or decree of restitution of conjugal rights: *Head* v. *H.* (*o*), *Fletcher* v. *F.* (*p*). The present case does not fall within any of these classes.

The next objection to these articles is, that as they contain no covenant to indemnify the husband against the wife's debts, they are void for want of consideration. The omission of that covenant has been shown to be a clerical error; and the respondents offered to supply it in the deed intended to carry the articles into execution, which it is quite competent for them to do under the 9th article. *Stephens* v. *Olive* (*q*) was the first case in which any reliance was placed on such a covenant to support a deed of separation, but it does not follow that the absence of it would affect the validity of the articles; *Guth* v. *G.* (*r*), *Fitzer* v. *F.* (*s*), *Cooke* v. *Wiggins* (*t*), *Innell* v. *Newman* (*u*), *Ross* v. *Willoughby* (*x*), *Wilson* v. *Musshett* (*y*), *Frampton* v. *F.* (*z*), *Hindley* v. *Westmeath* (*a*). The objection ill becomes the appellant, who admits that he sets no value on such a covenant, and never contemplated it. He has, besides, by the clerical error, obtained a better consideration in the trustees' covenant to pay his own debts, which the decree upholds. He has also the consideration of £1,000 a year, whereas, if the suit compromised by the articles had proceeded to a decree of nullity, he must give up, without any annuity, all the property which he acquired by the marriage. The stopping that suit was of itself a valuable and sufficient consideration: it was the only consideration, beyond the annuity, for which the appellant stipulated. Lord Hardwicke says, in *Fitzer* v. *F.* (*b*): "Considerations are not to

(*h*) 2 Cox, 207.
(*i*) 7 Price, 557.
(*k*) Jac. 125.
(*l*) 6 B. & C. 200.
(*m*) 1 Cox, 445.
(*n*) 3 V. 352.
(*o*) 3 Atk. 547.
(*p*) 2 Cox, 99.
(*q*) 2 Bro. Ch. 90.
(*r*) 3 Bro. Ch. 614.
(*s*) 2 Atk. 512.
(*t*) 10 V. 191.
(*u*) 4 B. & A. 419.
(*x*) 10 Price, 22.
(*y*) 3 B. & Ad. 743.
(*z*) 4 B. 287.
(*a*) 6 B. & C. 200.
(*b*) 2 Atk. 514.

be weighed in too nice scales." Where, however, there is a consideration for the husband's covenants, they will be enforced against him, even where there is no covenant, by a third party or trustee, to indemnify him, as appears in many cases from *Angier* v. *A.* (*c*), down to *Clough* v. *Lambert* (*d*).

Next comes the question whether a suit for nullity of marriage, on the ground of impotency, may be compromised by an agreement for separation. The objection attempted to be raised against such a compromise, upon the supposition that there is some principle of public policy to prevent it, is wholly untenable. No principle is stated in support of the fancied distinction drawn between a suit of that sort and suits for divorce in the ordinary cases of adultery and cruelty which are constantly compromised by private agreements for separation. The temporal Courts, in enforcing the agreement, do not inquire into the cause of separation, nor whether the spiritual Courts would grant a divorce. They have no jurisdiction or machinery for conducting such an inquiry; all they inquire into is whether the deed or articles of separation be a valid agreement, and show sufficient consideration for the covenants between the husband and third parties. * * * Deeds or articles of separation generally recite that the husband and wife, in consequence of unhappy differences, have agreed to separate, but they seldom disclose the nature or causes of those differences. Adultery and cruelty may be, and often are, the causes; but they are not essential to the validity of the agreement, and the supposition of their existence is excluded in many decided cases, in which other causes are expressly assigned. In *Sanky* v. *Golding* (*e*) the cause was "discord," and in *Seeling* v. *Crawley* it was "a quarrel." In *Head* v. *H.* (*f*) the wife's "infirmities" were the cause; in *Fletcher* v. *F.* (*g*) her "expensiveness." The cause is not mentioned in the reports of *Guth* v. *G.* (*h*), *Stephens* v. *Olive* (*i*), *Compton* v. *Collinson* (*k*), *Jee* v. *Thurlow* (*l*), *Fitzer* v.

(*c*) Pr. Ch. 296.
(*d*) 10 Si. 174.
(*e*) Carey, 124.
(*f*) 3 Atk. 547.
(*g*) 2 Cox, 99.
(*h*) 3 Bro. Ch. 614.
(*i*) 2 Bro. Ch. 90.
(*k*) *Id.* 377.
(*l*) 2 B. & C. 547.

F. (*m*), *Cooke* v. *Wiggins* (*n*), or *Frampton* v. *F.* (*o*), but that it was not for adultery or cruelty appears clear enough. Whenever these or other justifiable causes of separation exist, and the articles show a valuable consideration for the husband's covenants, they will be enforced, even though there is no third party or trustee: *Angier* v. *A.* (*p*), *Clough* v. *Lambert* (*q*).

The injunction restraining the appellant from proceeding in his wife's suit, in the Ecclesiastical Court, is consequential on the decree for specific performance of the articles, one of which provided for the termination of that suit. It is contended that it has the effect of a sentence of perpetual separation, inasmuch as it prevents the appellant from suing for restitution of conjugal rights, which, it is said in *Fletcher* v. *F.* (*r*), *St. John* v. *St. J.* (*s*), and *Westmeath* v. *W.* (*t*), a Court of equity has no power to do. The injunction does not go to that extent, although, if it did, there appears to be no reason for saying that the Court may not, on the application of the trustees, prevent the appellant from a breach of his contract, after a decree for specific performance. The injunction was not an invasion of the jurisdiction of the Ecclesiastical Court, but was intended to preserve the jurisdiction of the Court of Chancery over its own decree, and to prevent the appellant from defeating it, by resorting to another Court. In *Hill* v. *Turner* (*u*), Lord Hardwicke restrained a woman, who married a ward of Court clandestinely, from proceeding in the Ecclesiastical Court against the infant for restitution of conjugal rights, or against his guardian for alimony. In *The Bishop of Winchester* v. *Paine* (*x*), a party was restrained by injunction from obtaining probate of a will by fraud. This injunction had for its object to compel obedience to the decree; if that is not sustained, the injunction falls with it; but if it is sustained, the appellant has no reason for complaining

(*m*) 2 Atk. 511.
(*n*) 10 V. 191.
(*o*) 4 B. 287.
(*p*) Pr. Ch. 497.
(*q*) 10 Si. 174.
(*r*) 2 Cox, 99.
(*s*) 11 V. 527.
(*t*) Jac. 125; 1 Dow & Cl. 547.
(*u*) 1 Atk. 515.
(*x*) 11 V. 199.

of the injunction. * * * [They then considered the rejection of the evidence by the Vice-Chancellor.]

Sir F. Kelly, in reply. * * *

The Lord Chancellor (*y*).—In this case the articles of separation are between the husband, of the first part, the wife of the second part, and two trustees of the third part, reciting that the husband and wife had agreed to live separate and apart. The agreement is between the husband on the one part, and the two trustees, with the privity and approbation of the wife, on the other part; and it provides, first, that the wife may live separate; secondly, that the husband shall give up, for the use of the wife, certain property belonging to her, but in which he had a life estate under the marriage settlement; thirdly, that certain other estates, not included in the marriage settlement, should be enjoyed by the wife for her separate use during their joint lives, subject to an annuity of £1,000 a year to the husband; fourthly, it provides for securing to the wife certain jewels, furniture, and other articles, and securing to the husband £1,000 per annum; then it provides for executing a proper deed to effect these objects: and, lastly, it provides for putting an end to a suit instituted by the wife for nullity of marriage, conditioned if the husband should keep this contract.

The decree against which the appeal has been presented, directed a specific performance of these articles, and the execution of a proper deed for that purpose, with the necessary inquiries and directions; and it restrained the husband from any proceeding to compel the wife to proceed in the suit in the Ecclesiastical Court, or to pay the costs; and it dismissed the husband's cross cause, and ordered him to pay the costs of both suits.

The appeal was attempted to be supported upon two grounds: first, on the ground that the articles had been obtained by intimidation and duress—this, I think, wholly failed, and the cross bill

(*y*) The case was partly heard in 1846, by Lord Lyndhurst (then Chancellor), Lord Brougham, and Lord Cottenham. It was fully heard in 1847 by Lord Cottenham (then and in 1848 Chancellor) without any law lord.

was properly dismissed, with costs;—and, secondly, because Courts of equity ought not to entertain jurisdiction for performance of articles of separation.

The second head gave rise to a very protracted and learned argument, in which very many cases were cited, but of which very few of the later date seem to me necessary to be adverted to; for if those later cases, particularly some which have been decided in this House, have settled the law, all those which preceded them may be thrown aside.

It must be observed that the decree appealed from does not touch the question of separation, but only makes provision for a previous contract for that purpose; and enforces a contract respecting property growing out of such separation. If an agreement for the separation and living apart of a husband and wife be so contrary to public policy, and therefore illegal, as to make void all arrangements of property arising from it, then, in all cases, the only question would be, whether the arrangement of property was in consideration of or dependent on such illegal agreement. But what has this House decided upon the subject? In the very recent case of *Jones* v. *Waite* (*z*) the question was whether the execution of a deed of separation was a sufficient consideration for the agreement in question there, or whether it was illegal and void. Tindal, C.J., said: "My brothers and myself are of opinion that there is no illegality disclosed by this agreement; one part of the consideration for it is the execution of the deed of separation, which, as clearly appears from the declaration, was previously agreed upon and drawn up."

A case of *Bateman* v. *The Countess of Ross* (*a*) had previously (in 1813) occurred in this House, in which Lord Eldon and Lord Redesdale held an award good, which confirmed an arrangement of property "provided the husband and wife shall continue to live separate and apart"; Lord Eldon saying: "It was objected to the award that it assumed the jurisdiction of the Ecclesiastical Court in awarding a separation; but it did no such thing, it only assumed that there must be a separation, and provided accordingly." This case coming after that of *St. John* v. *St. J.* (*b*)

(*z*) 9 Cl. & Fin. 101.
(*b*) 11 V. 528.
(*a*) 1 Dow, 235.

takes off much from the weight of Lord Eldon's observations in that case.

In *Westmeath* v. *W.* (*c*) the objection was that the deed provided for a future separation; and there Lord Eldon says: "I apprehend that any instrument which provides for a present separation, and which prospectively looks to the parties living together again, and then to a future separation, that such a deed, so far as it provides for that future separation, will never be carried into effect."

The authorities in this House are therefore against the appellant; and now a long train of authorities at law and in equity has proceeded upon the same ground, but I will only mention the case at law of *Wilson* v. *Musshett* (*d*). In *Frampton* v. *F.* (*e*), Lord Langdale considered the principle established; and the Vice-Chancellor has held the same in several cases, such as *Clough* v. *Lambert* (*f*), and *Wellesley* v. *W.* (*g*).

It was contended that there was no consideration for the deed because there was no indemnity against the wife's debts, but only against those then owing by the husband. That, under the circumstances, was probably a more valuable indemnity than the other would have been; and there are other ample considerations for the deed. One part of the consideration is the provision as to the suit in the Ecclesiastical Court. The stopping of those proceedings appears to have been an important object to Mr. Wilson—of the reason for which he was the best judge—and that alone was a sufficient consideration. In *Bateman* v. *The Countess of Ross* (*h*), there was a suit pending for a divorce. Why is not the compromise of such a suit to afford consideration for an agreement? Is it desirable that the parties should be compelled to bring such complaint in the Ecclesiastical Court to public discussion? A similar answer applies to an argument, for which no authority was cited, that the Court will enforce such agreement only in cases in which the wife might have obtained

(*c*) 5 Bli. 367; 1 Dow & Cl. 519.
(*d*) 3 B. & Ad. 743.
(*e*) 4 B. 287.
(*f*) 10 Si. 174.
(*g*) *Id.* 256.
(*h*) 1 Dow, 235.

alimony in an Ecclesiastical Court. How is a Court of equity to try that? and upon what principles can such a rule stand? If the consideration or fact of separation does not contaminate all that proceeds from it, the Court is only exercising its ordinary jurisdiction in giving effect to the arrangement of property agreed upon.

It was then said that the suit for nullity might end in a sentence for restitution of conjugal rights, and that the injunction was calculated to prevent that object. It only prevents an unjust use being made by the husband of the wife's proceedings, instituted for a very different purpose, and does not interfere with any proceeding that the husband may adopt. It was said that there was nothing to prevent the wife prosecuting that suit. This Court does not interfere by injunction, when there is no prospect of danger, and if it should arise, the question might be raised in another suit.

The documents rejected were, I think, inapplicable, and if produced, could not have had any effect, and were, I think, properly rejected.

I therefore advise your Lordships to affirm the whole of the decree, and to dismiss the appeal, with costs.

NOTES.

1. Contracts between husband and wife for separation.
2. Consideration, p. 525.
3. Breaches of contract in agreements for separation, p. 525.
4. Other points connected with agreements for separation, p. 531.
5. Contracts for future separation, p. 535.

1. Contracts between Husband and Wife for Separation.

"There was a time when an agreement for separation between husband and wife was considered contrary to public policy. That opinion was rendered untenable by the decision of the House of Lords in *Wilson* v. *W.*, and since that decision it is clear that such an agreement cannot be said to be against public policy" (*i*). And it is in the highest degree desirable for the preservation of the

(*i*) *Per* Lindley, L.J., in *McGregor* v. *M.*, 21 Q. B. D. 430.

peace and reputation of families that such agreements should be encouraged rather than that the parties should be forced to expose their matrimonial differences in a Court of justice (*k*).

The Chancery Division will therefore enforce the specific performance of contracts for present separation, if the contract be otherwise valid; that is, if it be made between persons capable of contracting, and upon good consideration (*l*), and specific performance of an agreement for a separation deed, if complete, will be enforced (*m*).

The general rule is that there can be no contract between husband and wife, excepting contracts relating to the wife's separate estate. But it has long been established that where the husband and wife are in litigation for divorce or separation and are thus at arm's length, the wife is capable of contracting without the intervention of a trustee (*n*). In *Besant* v. *Wood* (*o*), Jessel, M.R., stated his opinion that if a married woman can compromise a suit after it has been instituted, by agreeing to live separate upon terms as regards maintenance of herself, custody of the children, and so forth, there was no reason why she should not have power to enter into such an agreement after the quarrel and before the litigation began; that, as a necessary corollary to the right to sue by herself, she must have the right to contract not to sue, and that therefore a woman can contract to live separate and apart from her husband. An injunction was accordingly granted restraining the defendant from suing for the restitution of conjugal rights (*p*).

In *McGregor* v. *M.* (*q*), the plaintiff had applied to the police for protection against the defendant, her husband, and in June, 1886, she took out a summons for assault. The defendant thereupon took out a cross summons against the plaintiff. When the summonses were about to be heard, negotiations took place, and

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(*k*) *Per* Sir James Hannen, in *Marshall* v. *M.*, 5 P. D., at p. 23.

(*l*) *Besant* v. *Wood*, 12 Ch. D. 605; *Courtney* v. *C.*, [1923] 2 Ir. R. 37.

(*m*) *Hart* v. *H.*, 18 Ch. D. 670.

(*n*) *Vansittart* v. *V.*, 4 Kay & J. 62; *Gibbs* v. *Harding*, L. R. 5 Ch. 338; *Bateman* v. *Ross*, 1 Dow, 235; and see *Cahill* v. *C.*, 8 A. C., at p. 431; *Butler* v. *B.*, 16 Q. B. D., at p. 378; Pollock (9th ed.), at p. 88.

(*o*) 12 Ch. D. 622.

(*p*) See *Hart* v. *H.*, 18 Ch. D. 670; *Gandy* v. *G.*, 7 P. D., at p. 80; *Rose* v. *R.*, 8 P. D. 100; *Cahill* v. *C.*, 8 A. C., at p. 431; *Clark* v. *C.*, 10 P. D., at pp. 193, 195; *Butler* v. *B.*, 16 Q. B. D. 374; *McGregor* v. *M.*, 21 Q. B. D., at p. 431; *Aldridge* v. *A.*, 13 P. D. 214; *Courtney* v. *C.*, [1923] 2 Ir. R. 37.

(*q*) 21 Q. B. D. 424.

it was agreed between plaintiff and defendant that they should live separate; that defendant, the husband, should pay plaintiff £1 per week, and that she therewith should maintain herself and her children; that she should indemnify him against all debts contracted by her, and that the summonses should be withdrawn. On an action by the wife on the agreement it was held the action was maintainable. There was no intervention of a trustee for the wife and there was no matrimonial suit. The C. A. held, that the agreement between the husband and wife was valid, as it fell within the exception to the general rule as to the incapacity of the husband and wife to contract with each other, such exception being that *all* proceedings which the husband and wife are capable of taking against each other may be compromised; that there was sufficient consideration to support it, namely, the withdrawal of the summons; that there was no necessity for a trustee; and that section 4 of the Statute of Frauds did not apply.

Lindley, L.J., in the above case pointed out that the object of interposing a trustee in such cases was, that the contract between the husband and wife being *prima facie* void, the trustee was interposed in order that his covenant to indemnify the husband might afford a consideration for the husband's promise, but that where there is a valid consideration as between husband and wife, there is no need of a trustee; and Bowen, L.J., was of opinion that, assuming the contract a valid one, there was no necessity for a trustee, and that the Married Women's Property Act, 1882, gives power to make such a contract without the intervention of a trustee (*r*).

A recital in a deed to which the wife is a party of an agreement to live separate is evidence of a contract by her to allow her husband to live separate from her, and after taking benefits under the deed she cannot be heard to say she had not so contracted, although there was no covenant by her, but only by her trustee (*s*).

The Court will generally decree specific performance of an agreement for a separation, when it has been *partially performed*, though it may be somewhat vague in its terms (*t*). Thus, in

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(*r*) And see *Sweet* v. *S.*, [1895] 1 Q. B. 12; *Hart* v. *H.*, 18 Ch. D., at p. 684; *Courtney* v. *C.*, [1923] 2 Ir. R. 37.

(*s*) *Clark* v. *C.*, 10 P. D. 188, 195; *Courtney* v. *C.*, [1923] 2 Ir. R. 31, 37. Cf. *Williams* v. *Baily*, 2 Eq. 731.

(*t*) See *Wilson* v. *West Hartlepool Ry. Co.*, 2 De G. J. & S. 475. And in *McGregor* v. *M.*, *supra*, the consideration was held to be executed.

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Hart v. *H.* (*u*), a suit having been instituted by a husband against his wife for a divorce on account of adultery, a compromise was signed by the husband and wife in these terms: "Petition and answer dismissed; deed of separation with usual covenants; costs of preparing deed to be borne by Mr. H.; Mr. H. to pay Mrs. H. for herself and child or children £150 a year quarterly; Mrs. H. to maintain the child or children; Mr. H. to pay wife's costs. In case of difference in working out these terms, matter to be referred to Mr. W. and Dr. D." (the leading counsel on each side). It was held by Kay, J., that the agreement was not too vague, and being on the face of it *complete*, the arbitration clause could only come into force in case of difference between the parties, and did not oust the jurisdiction of the Court to settle the deed; and a decree was made for specific performance, the deed of separation to be settled in chambers in case the parties differed (*u*).

It is a principle of the Court that it will not compel specific performance of an agreement, *e.g.*, to execute a deed of separation, unless it can execute the whole contract on both sides (*x*). So where there are any stipulations in an *agreement* for separation contrary to law or public policy, a Court of equity will not, even if it be made on sufficient consideration, separate one portion of it from the other, and decree specific performance of part, but will refuse to decree specific performance altogether. Thus, in *Vansittart* v. *V.* (*y*) (which was decided before the passing of the Custody of Infants Act, 1873), by a memorandum of agreement made between a husband and his wife who was suing him for a divorce, it was agreed that a deed of separation should be executed, containing, among other provisions therein mentioned, provisions that two of their children should be placed entirely in the custody of the wife, and that none of the children should be sent to any school in Berkshire, or at a less sum than £60 a year for each child, and that neither of the two eldest sons should be sent to any school without the written consent of both husband and wife, unless to certain specified places of education. It was held by the full Court of Appeal (affirming the decision of Sir W. Page Wood) (*z*), that the provisions as to the children were contrary to public policy, as interfering with the due discharge of the

(*u*) 18 Ch. D. 670.
(*x*) Fry (6th ed.), at pp. 383 and 717.
(*y*) 2 De G. & J. 249.
(*z*) 4 Kay & J. 62.

father's duties with respect to them; and that on this ground, apart from all other objections, a decree for the execution of the deed of separation could not be made (*a*).

In *Hart* v. *H.* (*b*) there was an agreement for a separation deed, one term of which was that Mrs. H. was to maintain the child or children. Kay, J., referring to *Vansittart* v. *V.*, *supra*, said that the Custody of Infants Act had removed what otherwise might have been possibly a difficulty, and ordered specific performance of the contract (*c*).

But an agreement by a husband who is petitioner in a suit for the dissolution of his marriage on account of the adultery of his wife, to withdraw from the suit in consideration of a sum of money paid and to be secured by the co-respondent, has been held to be a fraud upon the Divorce Act (*d*), and invalid as being against public policy (*e*).

Where, however, an agreement for separation has ceased to be executory, as where a separation deed has been executed, equity will enforce those of its stipulations which are in accordance with the law, although it may also contain others which are contrary to the law or public policy (*f*). In *Hulton* v. *H.* (*g*), a deed of separation had been entered into, under which the wife was to be paid £500 a year—a sum the wife agreed to accept upon the husband's representation that it was the utmost amount he could afford. The wife afterwards discovered that the husband's means were much larger than they had been represented. It was held that the wife was entitled to have the deed rescinded.

If a wife induces her husband to execute a deed of separation, in contemplation by her of her renewal of an illicit intercourse, it would be fraudulent as against the husband, and the deed will be invalid (*h*); and so where the deed had been executed upon the faith of the false assurance by the wife that she has not committed adultery (*i*).

(*a*) See also *Walrond* v. *W.*, John. 18; *Hope* v. *H.*, 8 De G. M. & G. 731; *Gibbs* v. *Harding*, L. R. 5 Ch. 336; *Hamilton* v. *Hector*, L. R. 6 Ch. 701.

(*b*) 18 Ch. D. 670, at pp. 681 and 682.

(*c*) See *Besant* v. *Wood*, 12 Ch. D. 605; *Hunt* v. *H.*, 28 Ch. D. 606; *Jump* v. *J.*, 8 P. D. 159.

(*d*) 20 & 21 Vict. c. 85.

(*e*) *Gipps* v. *Hume*, 2 John. & H. 517; *Brown* v. *Brine*, 1 Ex. D. 5. Cf. *Upton* v. *Henderson*, 106 L. T., at p. 839.

(*f*) *Vansittart* v. *V.*, 2 De G. & J. 249, at p. 255; *Walrond* v. *W.*, John. 18; *Hamilton* v. *Hector*, 13 Eq., at p. 524; Fry, at pp. 390 *et seq.*

(*g*) [1916] 2 K. B. 642; [1917] 1 K. B. 813.

(*h*) *Evans* v. *Carrington*, 2 De G. F. & J. 481.

(*i*) *Brown* v. *B.*, 7 Eq. 185.

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Where in a separation deed there is a covenant by which the husband undertakes to pay his wife an annuity without restricting his liability to such time as she shall be chaste, it is good and is not against public policy, and the covenant remains in force, and the annuity continues payable, although the wife afterwards commits adultery (*k*). But *semble*, that if such a deed were " prepared and so constructed as to enable a wife to commit adultery with impunity, and was executed with that object, the deed would be against public policy " (*l*).

It was held, even in quite early cases, that a deed of separation was a good answer to a husband seeking by *habeas corpus* to obtain the person of his wife (*m*).

2. Consideration.

An agreement by husband and wife to live apart is of necessity based upon consideration, and it becomes unnecessary to consider whether particular provisions contained in the deed do or do not amount to sufficient consideration. Thus in *Re Weston* (*n*) the separation deed contained a recital that the husband and wife had agreed to live apart. It was held that a covenant by the wife to live apart ought to be inferred from the recital, and that the husband's covenant to make certain provision for his wife was based upon valuable consideration. In the earlier cases some more definite consideration was deemed necessary (*o*).

In a case decided before the Married Women's Property Acts, where, on a separation, an agreement was entered into by a wife whose property was settled to her separate use without power of anticipation, that she would indemnify her husband against debts, such agreement was held not to amount to valuable consideration, as a married woman has no power to contract so as to bind property of that description (*p*).

3. Breaches of Contract in Agreements for Separation.

The Ecclesiastical Courts considered a separation by private arrangement as an illegal contract, and disregarded it as a bar to a

(*k*) *Fearon* v. *Aylesford*, 14 Q. B. D. 792; *Sweet* v. *S.*, [1895] 1 Q. B. 12.

(*l*) *Per* Cotton, L.J., 14 Q. B. D., at p. 808.

(*m*) See *R.* v. *Mead*, 1 Burr. 542; *R.* v. *Winton*, 5 T. R. 91. See *R.* v. *Jackson*, [1891] 1 Q. B. 671. (*n*) [1900] 2 Ch. 164.

(*o*) *Stephens* v. *Olive*, 2 Bro. Ch. 90; *Westmeath* v. *W.*, Jac. 126, 141; *Elworthy* v. *Bird*, 2 S. & S. 372; *Worrall* v. *Jacob*, 3 Mer. 256; *Logan* v. *Birkett*, 1 My. & K. 220; *Wellesley* v. *W.*, 10 Si. 256; *Gibbs* v. *Harding*, L. R. 5 Ch. 336; *Marshall* v. *M.*, 5 P. D., at p. 23.

(*p*) *Walrond* v. *W.*, John. 18.

suit for the restitution of conjugal rights (*q*). But a Court of equity (before the passing of the Judicature Acts) would, where a valid contract for separation had been entered into between husband and wife, grant an injunction to restrain proceedings by either party in the Ecclesiastical Court for a restitution of conjugal rights (*r*).

As the Divorce Court is now part of the High Court of Justice, and bound, like the other Divisions, to administer equity (*s*), the breach of a covenant in a separation deed will no longer be restrained by injunction in equity after such a suit has been instituted in the Divorce Court, but the breach should be pleaded in that Court as an equitable defence (*t*). And the Chancery Division will enforce a deed of separation, and will not be debarred from restraining a wife from *commencing* an action for restitution of conjugal rights by reason of trifling breaches of covenant on the husband's part (*u*).

The Court, moreover, will restrain a husband from personally molesting his wife (*x*), and a wife from personally molesting her husband (*y*), contrary to covenants contained in deeds of separation (*z*).

A wife by being party to a separation deed recognises its recitals (*a*), and such recitals may be taken as evidence of a contract between the husband and wife, which may be an equitable defence to a petition by the wife for restitution of conjugal rights, although the covenants in the deed are not by the wife but by the trustees, for in such a case she cannot be heard to say there is no agreement by her (*b*). And an agreement, although not by deed, will act as a bar (*c*).

The covenants in separation deeds are not reciprocal so that the observance of the one is a condition precedent, on the breach of

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(*q*) *Mortimer* v. *M.*, 2 Hag. Con. 318; *Westmeath* v. *W.*, 2 Hag. Ec. App. 115; *King* v. *Sampson*, 3 Adams, 277.

(*r*) *Hill* v. *Turner*, 1 Atk. 515; *Wilson* v. *W.*, 1 H. L. Cas. 538, 556, 575; *Hunt* v. *H.*, 4 De G. F. & J. 221.

(*s*) Judicature Act, 1925, ss. 18, 36—44.

(*t*) *Marshall* v. *M.*, 5 P. D. 22; and see *Kennedy* v. *K.*, [1907] P. 49; *Courtney* v. *C.*, [1923] 2 Ir. R. 31, 36.

(*u*) *Besant* v. *Wood*, 12 Ch. D. 605, 630; *Hart* v. *H.*, 18 Ch. D. 670.

(*x*) *Sanders* v. *Rodway*, 16 B. 207.

(*y*) *Flower* v. *F.*, 20 W. R. 231.

(*z*) *Williams* v. *Baily*, 2 Eq. 734; *Kitchin* v. *K.*, 19 L. T. 674; *Buckmaster* v. *B.*, L. R. 1 P. & D. 713.

(*a*) *Per* Baggallay, L.J., in *Clark* v. *C.*, 10 P. D. 192; *Re Weston*, [1900] 2 Ch. 164, 173.

(*b*) *Clark* v. *C.*, *supra*. Cf. *Williams* v. *Baily*, 2 Eq. 731.

(*c*) *Aldridge* v. *A.*, 13 P. D. 210.

which the other fails. They are independent covenants in the absence of express terms making them dependent. Thus, a breach of covenant not to molest is no answer to a breach of covenant to pay an annuity (*d*).

A suit by a wife for judicial separation is not of itself a breach of a covenant not to "molest or disturb" the husband (*e*), and neither adultery alone by the wife, nor adultery by her followed by the birth of a spurious child, is a breach of a covenant in a separation deed against molestation by the wife (*f*). But *semble*, adultery by the wife, followed by the birth of a spurious child whom she puts forward as the child of her husband, especially if this is done with intent to claim a title or property to which the legitimate offspring of her husband would be entitled, is evidence of a breach of a covenant against molestation by her (*g*).

And a husband is not debarred from enforcing a deed of separation, and from obtaining an order restraining his wife from commencing an action for the restitution of conjugal rights by reason of trifling breaches of the covenants on his part. But he may so misconduct himself as to lose his right to insist upon her covenants not to institute matrimonial suits (*h*). In *Besant* v. *Wood* (*i*) the husband had covenanted in a separation deed to allow an infant child to reside with the wife, but had subsequently concurred, as next friend of the infant, in a petition under the Infants' Custody Act (*k*), for the removal of the infant from the wife's custody, which had been ordered by the Court; and it was held by Jessel, M.R., that this was not a breach of the husband's covenant.

"The rule is clear that no rule of public policy, nor any other rule, prevents parties from agreeing that they will not found an application to the Court on past misconduct" (*l*).

In *Gandy* v. *G.* (*m*) there was a separation deed, by which, *inter alia*, the wife agreed to take £250 per annum for the support of

(*d*) *Fearon* v. *Aylesford*, *infra*; *Hart* v. *H.*, 18 Ch. D., at p. 683.

(*e*) *Thomas* v. *Everard*, 6 H. & N. 448; and see *Hunt* v. *H.*, [1897] 2 Q. B. 547.

(*f*) *Fearon* v. *Aylesford*, 14 Q. B. D. 792; *Sweet* v. *S.*, [1895] 1 Q. B. 12.

(*g*) *Fearon* v. *Aylesford*, 14 Q. B. D. 792, 810.

(*h*) Cf. *Gandy* v. *G.*, 7 P. D., at p. 80; *Bishop* v. *B.*, [1897] P. 138; and see *Kennedy* v. *K.*, [1907] P. 49.

(*i*) 12 Ch. D. 605.

(*k*) 36 Vict. c. 12.

(*l*) *Per* Jeune, P., in *Gooch* v. *G.*, [1893] P., at p. 106; *Rowley* v. *R.*, L. R. 1 H. L. Sc. 63; *Besant* v. *Wood*, *supra*; *Rose* v. *R.*, 7 P. D. 225.

(*m*) 7 P. D. 77, 168 (C. A.).

herself and family, and not to commence or prosecute any suit to compel her husband to allow her more. The husband afterwards committed adultery and cruelty. The wife instituted a suit for *judicial separation*, obtained a decree, and applied for an increase of alimony contrary to the covenant. The husband set up the deed, and the Court of Appeal held that the fact of adultery subsequent to the deed was not sufficient misconduct to deprive him of the benefit of the covenant, and that as the Court could not rectify the deed after a decree for separation, as it could have done after a dissolution (*n*), the deed was binding (*o*).

In *Rose* v. *R.* (*p*) a wife contracted with her husband that she would not in any suit enter into his conduct before the execution of the deed. She filed a petition for adultery and cruelty committed both before and after the deed. At the hearing the adultery was admitted, and the Court held that no cruelty had been committed since the deed. The Court granted a *judicial separation* founded on the adultery since the deed, but refused a dissolution, as the cruelty before the deed could not be gone into.

In *Gooch* v. *G.* (*q*) the parties had separated under a deed dated in 1886, which provided that no proceedings should be commenced or prosecuted by either party against the other in respect of any cause of complaint which then existed, or had arisen before the date of the deed. In 1890 the wife presented a petition for judicial separation on the ground of adultery in 1889 and 1890, whereupon the husband charged his wife with adultery in 1884. Both parties were found guilty. Held, that such words did not prevent the husband from setting up his wife's adultery *as a defence*. "The parties cannot by stipulation produce any higher effect than they can by condonation, or impose upon the Court the necessity of granting a judicial separation, notwithstanding the adultery of the petitioner. They may contract themselves out of their rights, but they cannot contract the Court out of its duty" (*r*).

In *Dowling* v. *D.* (*s*), a husband having been guilty of cruelty, he and his wife separated upon the terms of a deed by which they agreed that neither party should take proceedings against the other for dissolution of marriage or judicial separation on the

(*n*) *Morrall* v. *M.*, 6 P. D. 98; *Clifford* v. *C.*, 9 P. D. 76.

(*o*) Cf. *Besant* v. *Wood*, 12 Ch. D. 605; *Powell* v. *P.*, L. R. 3 P. & D. 56; *Benyon* v. *B.*, L. R. 1 P. & D. 447; *George* v. *G.*, L. R. 1 P. & D. 554.

(*p*) 7 P. D. 225; 8 P. D. 98 (C. A.).

(*q*) [1893] P. 99.

(*r*) *Ibid.*, at pp. 106, 107.

ground of *previous* misconduct, but that the deed should be void in case the marriage should be dissolved or a judicial separation granted on the ground of *subsequent* misconduct by either. The husband afterwards committed adultery. He did not plead the deed in answer to his wife's petition. The Court granted a decree *nisi* for the dissolution of the marriage (*s*).

The discovery of misconduct not contemplated in the separation deed, committed by one of the principal parties to the deed previous to its execution, may prevent its being set up as a bar to proceedings in Court, contrary to a covenant therein contained. Thus, where there was a deed of separation, whereby a wife agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance, but subsequently having discovered that he had been guilty of incestuous adultery, obtained a decree *for dissolution of the marriage*, it was held that notwithstanding the deed she was entitled to the usual order for permanent maintenance. "When she [the wife] has established that her husband has been guilty of incestuous adultery, a state of things arises not in contemplation when the deed was executed, and the wife is not restrained by the deed. Circumstances now justify her in bringing a suit for dissolution of marriage, and she is entitled to all the incidents of that suit, and amongst them to an allowance based on her husband's income" (*t*).

In *Tress* v. *T.* (*u*), a wife covenanted in a separation deed that she would not take any steps to compel her husband to cohabit with her. The husband covenanted to pay her an annuity. This he paid for a short time and then made default. She sued for restitution of conjugal rights. He did not appear. Held, the covenant of the wife was, under the circumstances, no bar. In *Moore* v. *M.* (*x*), the parties separated under a deed which contained no covenant not to sue. The husband petitioned for divorce on the ground of adultery, which failed, and the wife in her answer asked for separation; the husband did not set up the deed, and a decree for judicial separation was made.

(*s*) [1898] P. 228.

(*t*) *Per* Sir J. Hannen in *Morrall* v. *M.*, 6 P. D. 98, at p. 100; cf. *Newsome* v. *N.*, L. R. 2 P. & D. 306; *Gandy* v. *G.*, 7 P. D., at p. 175; *Fearon* v. *Aylesford*, 14 Q. B. D. 792; *Bishop* v. *B.*, [1897] P. 138. Cf. *Galloway* v. *G.*, 30 T. L. R. 531; *Law* v. *Harrigan*, [1917] W. N. 193. See as to improper conduct subsequent to the separation, *Brown* v. *B.*, L. R. 3 P. & D. 202; *Gooch* v. *G.*, [1893] P. 99.

(*u*) 12 P. D. 128.

(*x*) 12 P. D. 194.

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In *Kennedy* v. *K.* (*y*), in which case the wife was suing for restitution of conjugal rights and the husband had put in no defence, it was held by Barnes, J., that the Court could not ignore the fact that a separation deed had been admittedly executed. But the learned Judge granted restitution upon the ground that the husband by his conduct, and in particular by neglecting to make the agreed payments, had repudiated the deed. In later cases, however, in which the wife, in spite of the execution of a separation deed, has sued for restitution of conjugal rights (in breach of a covenant contained in such deed), and the husband has not pleaded the deed, it has been held that the Court is not bound to give effect to the deed, but if satisfied of the sincerity of the wife in asking her husband to take her back, the Court will make an order for restitution, notwithstanding that there has been no repudiation of the separation deed by the husband (*z*).

Where a deed of separation does in fact give a licence to commit adultery, it amounts to connivance, and would be a complete bar to a suit for judicial separation (*a*).

Where a husband, by a separation deed to which he, the trustees, and his wife, were the only parties, covenanted to pay the trustees an annual sum for the use of his wife, and for the expenses of maintaining and educating his daughters, it was held by the C. A. that neither of the daughters by her next friend, without the trustees, could bring an action to enforce the covenant; but leave to amend was given, and upon the trustees refusing to be joined and to sue the husband, the Court held the wife might do so (*b*).

"*Dum casta*" *Clause.*—A *dum casta* clause is not to be implied in a separation deed (*c*). Accordingly a covenant by the husband in such a deed to pay his wife an annuity, without restricting his liability to such a time as she shall be chaste, continues in force although the wife afterwards commits adultery (*d*). So where an agreement to separate provided for the execution of a deed of separation which was to contain the "usual covenants,"

(*y*) [1907] P. 49.

(*z*) *Williams* v. *W.*, [1921] P. 131; *Mann* v. *M.*, [1922] P. 238; *Palmer* v. *P.*, [1923] P. 180.

(*a*) *Thomas* v. *T.*, 2 Sw. & Tr. 113; *Gandy* v. *G.*, 7 P. D. 168.

(*b*) *Gandy* v. *G.*, 30 Ch. D. 57.

(*c*) *Gandy* v. *G.*, 7 P. D. 168.

(*d*) See judgment of Brett, M.R., in *Fearon* v. *Aylesford*, 14 Q. B. D., at p. 799; and of Cotton, L.J., at p. 808; *Sweet* v. *S.*, [1895] 1 Q. B. 12.

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Kay, J., held that these words did not include the "*dum casta*" clause (*e*). By a deed of separation, after reciting an agreement by the husband to make a weekly payment to the wife during her life so long as she should remain chaste, the husband covenanted in general terms to pay such sum to the wife. It was held the covenant, being ambiguous, was controlled by the recital, and that the husband's liability ceased on the wife's failure to remain chaste (*f*).

4. Other Points connected with Separation Agreements, etc.

Resumption of cohabitation and reconciliation put an end to separation deeds, and all the effects of separation (*g*); provided that on the true construction of the deed it appears that its provisions were only intended to take effect as long as separation lasted (*h*); but such resumption is not *per se* accord and satisfaction of arrears of an annuity covenanted to be paid by the husband to the wife while she was living apart from him (*i*). Where the deed, going beyond the immediate purposes of a separation deed, makes provision for the children of the marriage after the death of the wife, the trusts in favour of the children are unaffected by resumption of cohabitation (*k*). It has been laid down by the Court of Appeal that acts of connubial intercourse, while the husband and wife are living apart under a separation deed, do not afford conclusive evidence that the separation has come to an end (*l*).

Where a separation deed is made in anticipation of a separation which never takes place, the consideration having failed, the deed is wholly void, and the Court will not treat it as a voluntary deed, but will direct it to be cancelled (*m*).

But mere reconcilation, such as communication by letters, without cohabitation (*n*), and it seems that merely living together under the same roof, without reconciliation (as where it is shown

(*e*) *Hart* v. *H.*, 18 Ch. D., at p. 692—697; *Bradley* v. *B.*, 51 L. J. P. & M. 87.

(*f*) *Crouch* v. *C.*, [1912] 1 K. B. 378.

(*g*) *Bateman* v. *Countess of Ross*, 1 Dow, 245; *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339.

(*h*) See judgment of Bowen, L.J., in *Nicol* v. *N*, 31 Ch. D., at p. 529. Cf. *Haddon* v. *H.*, 18 Q. B. D. 778; *Matthews* v. *M.*, [1912] 3 K. B. 91.

(*i*) *Macan* v. *M.*, 70 L. J. K. B. 90.

(*k*) *Ruffles* v. *Alston*, 19 Eq. 539; *Re Spark's Trusts*, [1904] 1 Ch. 451.

(*l*) *Rowell* v. *R.*, [1900] 1 Q. B. 9.

(*m*) *Bindley* v. *Mulloney*, 7 Eq. 343; see also *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339.

(*n*) See *Slatter* v. *S.*, 1 Y. & C. Ex. C. 28; *Frampton* v. *F.*, 4 B. 287.

that the parties conducted themselves with the greatest animosity towards each other), will not have the effect of putting an end to a separation deed (*o*).

There is nothing illegal in continuing trusts for payment of money to the wife in the event of reconciliation (*p*).

If a husband after a separation requests his wife to return to him, and promises (even orally) that if she returns the annuity payable under a separation deed shall continue to be paid to her, and the wife upon this assurance returns to him, he will be bound to continue payment of such annuity (*q*).

The adultery of the wife will not prevent her taking proceedings under the deed or contract for separation (*r*). And a plea of the wife's adultery (*s*), of a divorce *a mensa et thoro* (*t*), or a dissolution of marriage (*u*), on account of adultery, will be no defence to an action by trustees for arrears of separate maintenance under a covenant in a separation deed (*x*), unless the covenant by unmistakable words limits his liability to the period during which the marriage relation continues (*y*).

Dissolution of Marriage.—In the case of *dissolution* of marriage, the Court has conferred upon it the right to vary both ante-nuptial settlements and post-nuptial settlements, to inquire into the existence of any ante-nuptial or post-nuptial settlements and to make such orders with reference to the application of the whole or any part of the property settled, for the benefit of the children of, or the parties to, the marriage, as the Court thinks fit (*z*). A separation agreement has been held to be a post-nuptial settlement within the meaning of the statute (*a*). In *Clifford* v. *C.* (*b*) the husband,

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(*o*) *Bateman* v. *Ross*, 1 Dow, 235, 245.

(*p*) *Nicholls* v. *Danvers*, 2 Vern. 671; *Wilson* v. *Mushett*, 3 B. & Ad. 743; *Bateman* v. *Ross*, 1 Dow, 235; *Byrne* v. *Carew*, 13 Ir. Eq. R. 1; *Crouch* v. *Waller*, 4 De G. & J. 302; *Randle* v. *Gould*, 8 El. & Bl. 457.

(*q*) *Webster* v. *W.*, 4 De G. M. & G. 437. Cf. *McGregor* v. *M.*, 21 Q. B. D. 424.

(*r*) *Seagrave* v. *S.*, 13 V. 443; *Fearon* v. *Aylesford*, 14 Q. B. D. 792; *Gandy* v. *G.*, 7 P. D., at pp. 171, 172. (*s*) *Baynon* v. *Batley*, 8 Bing. 256.

(*t*) *Jee* v. *Thurlow*, 2 B. & C. 547.

(*u*) *Goslin* v. *Clark*, 12 C. B. (N.S.) 681; *Clifford* v. *C.*, 9 P. D. 76.

(*x*) See *Charlesworth* v. *Holt*, L. R. 9 Ex. 38.

(*y*) *Ibid.*, 41, *per* Bramwell, B.

(*z*) See Judicature Act, 1925, s. 192, taking the place of 22 & 23 Vict. c. 61, s. 5; 41 Vict. c. 19, s. 3.

(*a*) *Worsley* v. *W.*, L. R. 1 P. & D. 648; *Jump* v. *J.*, 8 P. D. 159; *Clifford* v. *C.*, 9 P. D. 76. In *Boswarthick* v. *B.*, [1926] P. 159; [1927] P. 64, it was held that a bond executed by the wife to secure payment of an annuity to the husband during his life was a post-nuptial "settlement" within the meaning of the Act. (*b*) 9 P. D. 76.

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by a separation deed, covenanted to pay £52 per annum to a trustee for the benefit of the wife. She committed adultery and the marriage was dissolved. The husband did not pay the annuity, being under the impression that the dissolution put an end to the deed. The wife became chargeable to the parish, and a question arose with the guardians. The husband applied to vary or set aside the deed. Butt, J., refused to vary the deed, treating the case as one of alimony. The Court of Appeal, having regard to the conduct of the wife, especially in making charges against the husband in the suit for dissolution which she did not attempt to support, reduced the allowance to one-half (*c*).

And the Court has exercised this right where, in consequence of gross misconduct of the husband, discovered after the execution of a separation deed, the wife has subsequently obtained a dissolution of the marriage. In *Morrall* v. *M.* (*d*), a wife, by a deed of separation, agreed to accept certain sums as a provision for her support, and not to sue her husband for any further maintenance. Subsequently, having discovered that he had been guilty of incestuous adultery, she obtained a decree for the dissolution of the marriage. It was held that, notwithstanding the deed, she was entitled to the usual order for permanent maintenance (*e*).

In exercising the discretionary jurisdiction to vary settlements after a dissolution of marriage, regard must be had to the conduct of both parties, and not of one party only, and also to the interests of public morality. Thus, where a marriage had been dissolved at the suit of the husband, who himself admitted misconduct, the Court declined to vary the wife's settlement in his favour (*f*). Nor can the jurisdiction be exercised retrospectively; as by directing the trustees of the wife's settlement to recoup to the husband accumulations of past income received by her under the trusts of his settlement (*f*). It has been held, further, that where a marriage has been dissolved and the Court makes an order depriving the offending party of the right to a life interest or an annuity payable under a settlement, there is no jurisdiction under the Act to interfere with the destination of any arrears which may be owing in

(*c*) See *Boynton* v. *B.*, 2 Sw. & Tr. 275; *Gladstone* v. *G.*, 1 P. D. 442; *Maudslay* v. *M.*, 2 P. D. 256; *Wigney* v. *W.*, 7 P. D. 177; *Robertson* v. *R.*, 8 P. D. 94; *Jump* v. *J.*, 8 P. D. 159; *Ponsonby* v. *P.*, 9 P. D. 58; *Noel* v. *N.*, 10 P. D. 179. (*d*) 6 P. D. 98.

(*e*) And see *Jump* v. *J.*, 8 P. D. 159; *Clifford* v. *C.*, 9 P. D. 76; *Bishop* v. *B.*, [1897] P. 138.

(*f*) *Constantinidi* v. *C. and Lance*, [1905] P. 253; *Tickner* v. *T.*, [1924] P. 118.

respect of the life interest or annuity up to the date of the order (*g*). And a wife's protected life interest is not an interest which the Court can control under the statute, though the existence of such an interest may be taken into consideration by the Court when making an order for variation of settlements (*gg*).

In *Day* v. *D.* (*h*), it was held that where under a marriage settlement a wife has power to resettle settled property in the event of surviving her husband and marrying again, and, having been divorced, has married the co-respondent during her husband's lifetime, the Court may make an order preventing any resettlement on any husband married, or children born, during the husband's lifetime.

Judicial Separation.—But in the case of *judicial separation*, there being no such power (*i*), any deed executed remains binding. In *Gandy* v. *G.* (*k*), a husband committed adultery, and disputes arose between him and his wife, which led to his committing acts of legal cruelty. A separation deed was then executed, by which he agreed to allow her £250 a year, and to maintain the two youngest children, who were not to be in her custody; and she covenanted not to take any proceedings to compel her husband to allow her a larger amount of alimony. Subsequently the husband again committed adultery, and the wife obtained a decree for judicial separation and an order that she should have the custody of the two youngest children. The husband had, since the date of the separation deed, become wealthy, and the wife applied for an inquiry as to his means with the view of obtaining increased alimony. It was held by the C. A. that increased alimony could not be ordered, for since the Court had not, as in the case of a decree for dissolution of marriage, power to alter the separation deed, the covenant by the wife not to sue for increased alimony was binding on her, and must have effect given to it, the husband not having been guilty of such misconduct as under the circumstances of the case would disentitle him to claim the benefit of the deed (*l*).

(*g*) *Paul* v. *P.*, L. R. 2 P. & D. 93; *Boswarthick* v. *B.*, [1926] P. 159.

(*gg*) *Constantinidi* v. *C. and Lance*, [1905] P. 253; *Tickner* v. *T.*, [1924] P. 118.

(*h*) 78 L. T. 358; and see *Noel* v. *N.*, 10 P. D. 179; *Williams* v. *W.*, [1920] P. 69.

(*i*) See the terms of section 192 of the Judicature Act, 1925, replacing section 5 of the Matrimonial Causes Act, 1859.

(*k*) 7 P. D. 182.

(*l*) See *Morrall* v. *M.*, *supra*; *Bishop* v. *B.*, [1897] P. 138.

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The existence of a separation deed, none of the provisions of which had been acted upon, was held to be no ground for refusing relief to the wife on account of the desertion of the husband some time after the execution of the deed (*m*).

After a separation by private arrangement of the parties, a husband and wife still retain their relative positions which formerly could only be dissolved by Parliament (*n*), and now by proceedings under the Divorce Act (*o*); the husband will, consequently, be liable for his wife's debts, unless he provides for her maintenance by an adequate allowance, and it is regularly paid; in which case he will have a good defence to an action brought against him for goods supplied to his wife (*p*).

An ordinary deed of separation does not amount to a licence to commit future adultery (*q*). Hence, it was no bar to an action for damages by the husband for the seduction of his wife (*r*); nor would it, in the absence of express stipulation to that effect, prevent a wife from claiming her share of her husband's personal estate under the Statute of Distributions (*s*).

5. Contracts for Future Separation.

Generally speaking, agreements between husband and wife for separation at some future time are void, as contrary to public policy (*t*). But if husband and wife, who are at the time cohabiting, enter into an agreement providing for a present separation and such separation immediately takes place, the agreement is valid (*u*).

A separation deed providing for immediate separation may, if not acted upon, be held void (*x*) if it is not something more than

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(*m*) *Cock* v. *C.*, 13 W. R. 188.

(*n*) *Marshall* v. *Rutton*, 8 T. R. 545.

(*o*) 20 & 21 Vict. c. 85.

(*p*) *Hodkinson* v. *Fletcher*, 4 Camp. 70; *Hindley* v. *Westmeath*, 6 B. & C. 200; *Mizen* v. *Pick*, 3 M. & W. 481; *Reeve* v. *Conyngham*, 2 C. & K. 444.

(*q*) *Sullivan* v. *S.*, 2 Adams, 299, at p. 303.

(*r*) *Chambers* v. *Caulfield*, 6 East, 244.

(*s*) *Slatter* v. *S.*, 1 Y. & C. Ex. C. 28.

(*t*) *Westmeath* v. *W.*, 1 Dow & Cl. 519; *Westmeath* v. *Salisbury*, 5 Bli. (N.S.) 339; and see *Durant* v. *Titley*, 7 Price, 577; *Vandergucht* v. *De Blaquiere*, 5 My. & C. 229; *Cartwright* v. *C.*, 3 De G. M. & G. 982; *H.* v. *W.*, 3 Kay & J. 382; *Merryweather* v. *Jones*, 4 Gif. 509; *Procter* v. *Robinson*, 14 W. R. 381; *Harrison* v. *H.*, [1910] 1 K. B., at p. 40; *Brodie* v. *B.*, [1917] P. 271.

(*u*) *MacMahon* v. *M.*, [1913] 1 Ir. R., at p. 161; *Courtney* v. *C.*, [1923] 2 Ir. R. 31.

(*x*) *Westmeath* v. *Salisbury*, *supra*; *Bindley* v. *Mulloney*, 7 Eq. 343.

a mere separation deed (*y*). Where husband and wife are already living apart, and a deed of agreement is entered into with a view to their coming together again, and such deed contains a covenant by the husband making provision for the wife in the event of a future separation, such covenant is valid and enforceable (*z*).

In *Re Moore* (*a*), testator directed his trustees to pay to his sister during such time as she might live apart from her husband, before his son attained twenty-one, the sum of £2 10s. per week. The sister was then living, and until after the testator's death was living, with her husband, but subsequently they separated. Held, the object of the gift was to promote separation, and therefore void. But if the testator's sister had been living apart from her husband at the time of the testator's will and at his death, the gift, it seems, would have been valid (*b*).

In *Re Hope Johnstone* (*c*), by a post-nuptial settlement the husband assigned leaseholds to trustees upon trust to pay the rents to his wife for life, or so long as she should continue the cohabiting wife or the widow of the settlor, for her separate use, and upon the determination of the trust in favour of the wife the husband took an interest in the settled property. Some years after the date of the settlement the husband and wife separated by mutual consent, and they had not since cohabited. Held that the restriction of the wife's enjoyment of the rents to the period of cohabitation was not void as against the policy of the law, and that the trust in her favour determined upon her ceasing to live with her husband.

In *Re Meyrick's Settlement* (*d*), the wife in 1910 presented a petition for divorce, but proceedings were stayed and the parties came together again, and a deed was executed declaring trusts of a fund (entirely provided by the wife) for the benefit of the wife, the husband, and the issue of the marriage. It contained a proviso that if either husband or wife should take proceedings for divorce or judicial separation, all the trusts should be void (without prejudice to anything already done thereunder) and that the trust fund should thenceforth be held in trust for the wife absolutely. In 1920 the wife presented a petition for divorce. It was held that the proviso was valid and that the wife was accordingly absolutely entitled to the trust fund.

(*y*) *Ruffles* v. *Alston*, 19 Eq. 539; *Nicol* v. *N.*, 31 Ch. D., at p. 529

(*z*) *Harrison* v. *H.*, [1910] 1 K. B. 35; *MacMahon* v. *M.*, [1913] 1 Ir. R. 154; *Purser* v. *P.*, *ibid.* 422, 428; *Re Meyrick's Settlement*, *infra*.

(*a*) 39 Ch. D. 116.

(*b*) *Re Lovell*, [1920] 1 Ch. 122.

(*c*) [1904] 1 Ch. 470.

(*d*) [1921] 1 Ch. 311.

COUNTESS OF STRATHMORE *v.* BOWES (*a*).

1789. 1 V. 22; 1 R. R. 76.

Fraud on Marital Rights.

A woman, pending a treaty of marriage with A, settled all her property to her separate use, with his approbation; a few days after, B, by a stratagem, induced her to marry him, the day after she first thought of it: B had no notice of the settlement. The settlement was established, and a deed of revocation obtained by duress set aside.

The burthens, to which a husband is liable, are a consideration for his marital rights, upon which, therefore, fraud may be committed.

Conveyance by a woman under any circumstances, and even the moment before marriage, is good, *prima facie*: is bad only if fraudulent, as where it is made pending the treaty, without notice to the intended husband.

Lady Strathmore, being seised and possessed of great property, both real and personal, pending a treaty of marriage with Mr. Grey, conveyed all her real, and assigned all her personal, estate to trustees for her sole and separate use, notwithstanding any future coverture. This settlement was prepared with the approbation of Grey. A few days after the execution, hearing that Mr. Bowes had fought a duel on her account with the editor of a newspaper, who had traduced her character, she determined to marry him, and the marriage took place the next day. Bowes had no notice of the settlement. There were two bills: an original bill by Lady Strathmore to set aside a deed revoking the settlement, as having been obtained by duress: and a cross bill by Mr. Bowes to set aside the settlement, as against the rights of marriage, and a fraud upon him, and to establish the deed of revocation. An issue was directed to try whether the deed of revocation had been obtained by duress; and the verdict in the Common Pleas was against the deed. The cause coming on upon the equity reserved, Buller, J., sitting for the

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(*a*) *S. C.*, on the first hearing, 2 Bro. Ch. 345; 2 Cox, 28; affirmed, on appeal, 6 Bro. P. C. 427, Toml. edit.

Countess of Strathmore v. Bowes.

Lord Chancellor, decreed in favour of Lady Strathmore, and dismissed the cross bill with costs. It came on again for a rehearing.

Lord Chancellor Thurlow.—* * * I never had a doubt about this case. If it is to be considered upon the ground of its being against a rule of judicial policy, the arguments for Mr. Bowes would have had great weight. The law conveys the marital rights to the husband, because it charges him with all the burthens, which are the consideration he pays for them; therefore, it is a right upon which fraud may be committed. Out of this right arises a rule of law that the husband shall not be cheated on account of his consideration. * * *

A conveyance by a wife, whatsoever may be the circumstances, and even the moment before the marriage, is *prima facie* good, and becomes bad only upon the imputation of fraud. If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie*, because affected with that fraud.

As to the morality of the transaction, I shall say nothing to that. They seem to have been pretty well matched. Marriage in general seems to have been Lady Strathmore's object: she was disposed to marry anybody, but not to part with her fortune. This settlement is to be considered as the effect of a lucid interval, and if there can be reason in madness, by doing this she covered a spark of understanding.

The question which arises upon all the cases is, whether the evidence is sufficient to raise fraud. Even if there had been a fraud upon Grey, I would not have permitted Bowes to come here to complain of it. But there was no fraud, even upon Grey, for it was with his consent; and so I cannot distinguish it from a good limitation to her separate use. Being about to marry Grey, she made this settlement with his knowledge; and the imputation of fraud is, that having suddenly changed her mind and married Mr. Bowes, in the hurry of that improvident transaction she did not communicate it to him; but there was no time, and could be no fraud, which consists of a number of circum-

stances. It is impossible for a man marrying in the manner Bowes did to come into equity and talk of fraud. Therefore, the decree must be affirmed, with costs; but let him have all just allowances.

NOTES.

This case, the report of which, and the notes, have been greatly abbreviated from the report and notes in earlier editions of this work, is of very little more than historical interest. The doctrine concerning fraud on marital rights was formerly of considerable importance; but its only (present) application (if any) would be in connection with an instrument executed in fraud of a husband's marital rights under the old law, the marriage taking place before 1883. In the case of any marriage since 1882, a settlement executed by a wife, without the knowledge of her husband, just before the marriage, would not be within the doctrine of the *Countess of Strathmore* v. *Bowes*. But such a settlement—as also a settlement executed, just before the marriage, by a husband without the knowledge of his wife—could only be upset upon the ground of fraud, or upon such other special grounds as may enable any transaction to be attacked and set aside.

It was clearly settled, that if a woman, during a treaty for marriage, held herself out to her intended husband as entitled to property, which would become his upon the marriage, and then made a settlement of it without his knowledge, fraud would be imputed to her, and the settlement set aside in a Court of equity (*b*).

In *Goddard* v. *Snow* (*c*), a woman ten months before marriage, but *after the commencement of* that intimate acquaintance with her future husband which ended in marriage, made a settlement of a sum of money which he did not know her to be possessed of. The marriage took place, she concealing from him both her right to the money and the existence of the settlement. Ten years afterwards she died, and after her death the husband filed a bill to have the money paid to him. It was argued, on behalf of the

(*b*) *England* v. *Downs*, 2 B. 522; see also *Howard* v. *Hooker*, 2 Ch. R. 81; *Carleton* v. *Dorset*, 2 Cox, 33.

(*c*) 1 Russ. 485; but see *St. George* v. *Wake*, 1 My. & K. 622. See also *Downes* v. *Jennings*, 32 B. 290; *Prideaux* v. *Lonsdale*, 1 De G. J. & S. 433; *Chambers* v. *Crabbe*, 34 B. 457.

defendants, that, as the husband did not know of the existence of the sum of money, and was therefore not induced to contract the marriage on the notion that it would be subject to his marital rights, no fraud, such as the authorities held to be necessary, had been committed; that there was, at the utmost, only concealment, and that concealment alone was not sufficient to avoid a settlement confessedly valid at law. Gifford, M.R., however, held that the settlement was void against the husband, as a fraud upon his marital rights.

But a gift or settlement, by a woman, of her property, during the treaty for marriage, would not be set aside, if the husband knew of the gift or settlement before the marriage (*d*), even though the husband be a minor (*e*).

The seduction by a man of his intended wife might be a reason why the Court should not set aside a settlement made by her before marriage (*f*).

In a case in 1863, a settlement made by a woman of her personal property after her engagement to be married, was set aside at the suit of the husband, although he was told before the marriage that she had executed a settlement affecting her property, it appearing that neither she nor her husband was accurately informed of the nature and effect of the trusts of the settlement (*g*).

If a husband acquiesced in, or confirmed, a settlement, he would not afterwards be allowed to dispute it (*h*).

But in *Downes* v. *Jennings* (*i*), it was held that delay in instituting a suit for two and a half years after the discovery by the husband of the settlement did not operate as a bar.

If a woman gave a security to a *volunteer*, prior to marriage, without the consent of the intended husband, it might be set aside by him (*k*).

But where a woman, about to marry, gave a bond for *valuable consideration*, although without her intended husband's knowledge, it was held that the husband could not be relieved against it (*l*).

(*d*) *St. George* v. *Wake*, 1 My. & K. 610; *Ashton* v. *M'Dougall*, 5 B. 56; *Griggs* v. *Staplee*, 2 De G. & Sm. 472.

(*e*) *Slocombe* v. *Glubb*, 2 Bro. Ch. 545; *Wrigley* v. *Swainson*, 3 De G. & Sm. 458.

(*f*) 1 Ha. 608, 616; but see *Downes* v. *Jennings*, 32 B. 290.

(*g*) *Prideaux* v. *Lonsdale*, 4 Gif. 159; 1 De G. J. & S. 433.

(*h*) *St. George* v. *Wake*, 1 My. & K. 610; *Maber* v. *Hobbs*, 2 Y. & C. Ex. C. 317.

(*i*) 32 B. 290.

(*k*) *Lance* v. *Norman*, 2 Ch. R. 79,

(*l*) *Blanchet* v. *Foster*, 2 Ves. Sen. 264; *Llewellin* v. *Cobbold*, 1 Sm. & G. 376.

ELIBANK *v.* MONTOLIEU.

1799, 1801. 5 V. 737; 5 R. R. 151.

Wife's Equity to a Settlement.

Upon the bill of a married woman, entitled to a share of the personal estate as one of the next-of-kin of the intestate, against her husband and the administrator, the latter claiming to retain towards satisfaction of a debt by bond from the plaintiff's husband to him, it was declared he was not entitled to retain: but that the plaintiff's share was subject to a further provision in favour of her and her children, the settlement on her marriage being inadequate to the fortune she then possessed; and it was referred to the Master to see a proper settlement made on her and her children, regard being had to the extent of her fortune and the settlement already made upon her.

In 1795, Lady Cranstown died intestate, possessed of large personal property, leaving two brothers and two sisters her next-of-kin. Lewis Montolieu, one of her brothers, took out letters of administration to her.

The bill was filed by Lady Elibank, one of the sisters, against her husband Lord Elibank, and against Montolieu, *praying an account of the plaintiff's share, and that it may be settled on her and her family*

The defendant Montolieu, by his answer, claimed to retain Lady Elibank's share towards satisfaction of the debt due to him from Lord Elibank by two bonds—one dated May 31, 1783, for £12,217 9s. 9d.; the other, dated November 14, 1794, for £1,000 —upon the ground of the *provision made for the plaintiff by the settlement previous to her marriage with the defendant Lord Elibank*, in 1776. By that settlement, the sums of £12,000 and £5,000 New South Sea Annuities were settled in trust for Lord Elibank for life; and after his decease, for Lady Elibank for life as a jointure, and in lieu of dower or thirds; and after the decease of both, in trust for the children. The sum of £4,000 New South Sea Annuities was settled in trust for her separate use for life; and after her death, for her children; and £2,000

Elibank v. Montolieu.

£5 per cent. Bank Annuities for her separate use for life; and after her death, for her children, as she should by will appoint. All these sums were her property before marriage. The settlement also gave her some contingent interests.

In the entail of Lord Elibank's estate, a power was reserved to charge £200 a year jointure, and £50 a year to each of his younger children, not exceeding in the whole £200 a year, under a condition, that the estate should be chargeable with only one jointure at a time; and that, if the power of charging for children had been exercised by a preceding heir in tail, the heir in possession should not charge for his younger children. The defendant Lord Elibank, by his answer, stated that a former Lord Elibank did charge to the full extent of that power.

[After the arguments, which are omitted, judgment was reserved.]

Lord Chancellor Loughborough (*a*).—The only difficulty I had in this cause was upon the form of the suit; whether a married woman by her next friend could be the plaintiff in this Court.

With respect to the point made by the answer of Montolieu, that he had a right to retain against the debt of the husband, being possessed of the fund as administrator, and the wife being one of the next-of-kin, I am very clearly of opinion the defendant had no right to retain. The administrator is trustee for the next-of-kin: the plaintiff being one of them, if she has any equity against her husband with regard to this money, that equity will clearly bar any right of retainer he can set up to the property of which he became administrator.

With respect to the only difficulty I had upon the point of form, if she is entitled, and there is no way of asserting her right against her husband, except by a bill, that objection, I think, does not weigh much. If the defendant Montolieu had done what would have been the natural thing and the right thing, and what he certainly would have done but for his own interest, he would have been the plaintiff, desiring the Court to dispose of the fund, and for her benefit, to protect her interest in it. Then,

(*a*) Afterwards Earl of Rosslyn.

upon all the circumstances, it is very clear, if it had come before the Court, it would have been matter of course to have pronounced upon her equity upon the bill of the administrator, praying that the money in his hands might be properly disposed of; and I would not have suffered this money to be paid to Lord Elibank without making a provision for her, for the provision upon her marriage was clearly not adequate to her fortune; and it is clear that provision was made upon the expectation that, by circumstances to occur in his family, there would be an opportunity to do better for her at a future period.

Declare, that the defendant Montolieu is not entitled to retain, in satisfaction of the debt due from the defendant Lord Elibank to him, but that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff, as one of her next-of-kin, is subject to a farther provision in favour of the plaintiff and her children. Refer it to the Master to take the accounts, and to see a proper settlement made upon the plaintiff and her children, regard being had to the extent of her fortune and the settlement already made upon her.

MURRAY *v.* LORD ELIBANK.

1804. 10 V. 84; 7 R. R. 346.

Wife's Equity to a Settlement.

Children have a right to a provision out of the property of their mother, under a decree directing a settlement by the husband on her and her children, notwithstanding her death before the report, but the mother may waive her equity to a settlement, and so defeat the right of the children at any time before the completion of the settlement.

Previously to a bill a trustee for a *feme covert* may pay her personal property, or the rents and profits of her real estate, to her husband; not after bill filed.

Demurrer to the bill of the children was overruled.

The bill was filed by the infant children of Lord Elibank, stating the proceedings in the cause *Lady Elibank* v. *Montolieu*, and the decree, directing the Master to approve a proper settlement to be made by the defendant Lord Elibank on the plaintiff, Lady Elibank his wife, and her children by him, regard being had to the extent of her fortune and the settlement already made upon her by Lord Elibank.

The bill farther stated that before any report, Lady Elibank died intestate; and prayed that it may be declared, that the plaintiffs and the defendant Alexander Murray, another child of Lord and Lady Elibank, have, under the decree of February 19, 1801, a right to have a provision made for them out of the said one-fourth of the personal estate of Lady Cranstoun: and that it may be referred to the Master to approve of a proper settlement to be made by the defendant Lord Elibank upon the plaintiffs and the defendant Alexander Murray, being all the children; regard being had to the extent of the fortune of Lady Elibank, and the settlement already made by Lord Elibank.

To this bill the defendant Montolieu put in a demurrer.

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Lord Chancellor Eldon.—There are two points upon this demurrer; one of form, the other upon the merits. If the wife

has this equity for a provision for herself and her children up to the moment of the completion, it is competent to her to give it to her husband. A great variety of proceedings have occurred, in which the Master has stated that, with reference to the point of settlement, the party had waived it; and I apprehend, it will be found that she may, between the period of the order and her death, waive the benefit of that order (*a*). The question then is, if between the date of the order and her death, she does not, by some authoritative proceeding, express an alteration of her mind, whether that order is to stand for the benefit of the children. The two decisions that have been mentioned are strong authorities for that. Let an inquiry be made into the circumstances of those cases; and, as to the latter, whether the assignees of the husband were heard or not.

At a later date.

Lord Chancellor Eldon.—The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife dies without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case to which Mr. Madocks alluded was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding that went no farther than an order to lay a proposal before the Master. The husband, where he can, is entitled to lay hold of his wife's property, and this Court will not interfere. Previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband. Lord Alvanley, in *Macaulay* v. *Philips*, has laid down that, after a bill filed, the trustee cannot exercise his discretion upon that; that the bill makes the Court the trustee, and takes away his right of dealing with the property, as he had it previously. I have heard that otherwise stated in this Court, at the Bar, at least. But that case is the last; and I think contains very wholesome doctrine upon that point. I should have supposed a decree made

(*a*) See *Lloyd* v. *Williams*, 1 Madd. 466.

in the cause proceeded upon the right or equity in the wife at the filing of the bill; for decrees are only declarations of the Court upon the rights of the parties when they begin to sue. The wife is entitled to call for a declaration that she then had a right to a provision for herself and her children; and yet it is clear, after such a bill filed, she might come into Court and consent to her husband's having the fund entirely under his dominion. If she does not, the Court, by the decree, orders a proposal to be made for a settlement upon the wife and issue.

It has been truly observed that this doctrine is a mere creature of the Court, founded altogether in its practice. The case of *Macaulay* v. *Philips* proves, what I should have had no doubt upon, that notwithstanding that order for a proposal, if either party died while it rested merely in proposal, that would not affect the right by survivorship as between the husband and wife. There were no children in that case certainly. It is not unfrequent, where the Master makes his report after a decree, for him to state that the parties had declined to lay a proposal for a settlement before him. That has occurred since I have sat here; but, when at the Bar, I was frequently concerned in this final arrangement that, notwithstanding such order by the original decree, upon further directions the wife came consenting that the fund should be taken out of Court, and was permitted to do so. If, therefore, the issue have a right against the father, it is dependent altogether upon the will of the mother. There is, perhaps, some difficulty in making all the principles of the Court upon this subject consistent with the notion of such right in the children; but it is not for me to reconcile all these principles, if there is practice sufficient to establish a given course as to that. In *Rowe* v. *Jackson* (and I can, from my own memory, confirm both accounts of that case), upon an application, where it was necessary to consider whether, the wife never having expressed any change of opinion between the period of the order for a proposal and her death, that order gave the children any right, Mr. Madocks stated that it was not according to the practice, after that order, to permit the husband to avail himself of the death of the wife to take the fund, leaving the children unprovided. His authority, always considerable, is in that instance peculiarly

to be regarded, as he referred to another case in which Lord Thurlow was satisfied that such was the rule, and acted upon it. But it does not rest there; for in a subsequent case it is clear from the Register's books that Mr. Mansfield, after the death of the wife, moved that a sum of money should be paid to the husband; and Lord Thurlow refused that application, upon the ground that the order for a proposal on behalf of the children was an obstacle. That was followed by what Lord Alvanley did upon a petition; whether regularly or not, will not shake the doctrine, considering what had been done before. In that instance, Lord Alvanley would not deliver out that small sum, little more than £300, until satisfied that there was some provision for the children.

Taking all this together, however numerous the difficulties upon it, it is too much for me to say, upon the argument of a demurrer, all that has been done in the cases referred to is to go for nothing, because it is difficult to say, *ab ante*, it should be done, and that I am to set up a different course of practice. I agree also with Mr. Alexander as to the *dictum* of Lord Alvanley in *Macaulay* v. *Philips*, which construction is necessary to make him consistent; and attention being given to the circumstance that there were no children, there is no inconsistency in that case. The principle must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper; otherwise, to be left standing for their benefit at her death.

Next, as to the form: if the children have acquired a right by the judgment in the former suit, it is subsequent to the institution of the proceeding in that suit; and unless they can apply by petition, under the liberty to apply, I do not see how they can, except by supplemental bill.

The demurrer, therefore, ought to be overruled. If, upon the hearing of the cause, this should turn out to be wrong, it is infinitely better that it should go to the House of Lords upon a full hearing. Demurrer overruled.

Subsequently in 1809, this cause came for hearing before Grant, M.R., and the plaintiffs were held clearly entitled. The case is reported in 13 V. p. 1, and 14 V. p. 496.

Murray v. Lord Elibank.

NOTES.

From a very early period the Court of Chancery recognised in certain cases a wife's equity to a settlement out of property which the husband was entitled to receive "*jure mariti.*" This equity, which was referred to in the last edition of this work (published in 1910) as having become "superseded to a great extent by the *Married Women's Property Act*, 1882," has now become almost obsolete. The doctrine can have no future application, unless (1) the marriage occurred before 1883, and (2) the title to the property accrued before that date, and (3) the fund has not yet been reduced into actual possession.

At common law, on marriage, the husband became entitled to receive the rents of the wife's real estates during their joint lives, and he became absolutely entitled to all her chattels personal in possession, and to her choses in action, as debts by obligation, contract, or otherwise, *if he reduced them into possession*; or if he did not, as administrator of his wife, if he survived her. As regards her chattels real, the husband had full power to alien them and to keep the proceeds for his own use. But if he died before his wife, without having reduced into possession her choses in action, or without having aliened her chattels real, they would survive to the wife (*b*).

The jurisdiction to compel the husband, or those claiming under him, to make a settlement upon the wife, was first assumed where it was necessary for the husband to apply to the Court, as in cases in which a trustee declined to pay, etc., the wife's possessory interest to the husband, and the Court, acting upon the maxim, *that he who seeks equity must do equity*, withheld its aid until an adequate settlement was made upon the wife (*c*).

But since the decision of *Elibank* v. *Montolieu*, the wife has been permitted actively to assert her equity as a plaintiff in a suit (*d*); or if there be already an existing suit, by petition therein (*e*) at any time before the husband has reduced his wife's equitable property into actual possession (*f*).

(*b*) See *Langham* v. *Nenny*, 3 V., at p. 469; *Fleet* v. *Perrins*, L. R. 4 Q. B. 500.

(*c*) *Bosvil* v. *Brander*, 1 P. W. 459; and see Story (3rd ed.) 587; Lewin (12th ed.) 951; Seton (7th ed.) 906.

(*d*) *Duncombe* v. *Greenacre*, 28 B. 472; *Re Briant*, *infra*.

(*e*) *Greedy* v. *Lavender*, 13 B. 62; *Scott* v. *Spashett*, 3 Mac. & G. 599.

(*f*) And see *Newenham* v. *Pemberton*, 1 De G. & Sm. 644; *Re Briant*, 39 Ch. D., at p. 476; *Re Howard*, 13 R. 233.

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The equity is an obligation which the Court fastens *not* on the property, but upon the right to receive it (*g*).

Since the Judicature Act, 1873 (now replaced by the Supreme Court of Judicature (Consolidation) Act, 1925) law and equity have been administered concurrently (*h*), and all the Courts are to recognise and take notice of all equities (*i*). As the equity first arose upon the husband's coming to a Court of equity for assistance, which the Court withheld until a provision for the wife was secured (*k*), it would seem that the Supreme Court will now, as the equitable rule is to prevail, recognise and give effect to this equity whether the subject-matter of the action be legal or equitable (*kk*).

Duty of trustees.—A trustee was always justified in refusing to pay over, even at her request, the wife's fund to the husband, thereby enabling him to reduce it into possession; and in thus insisting on affording her an opportunity of asserting her equity to a settlement (*l*); and in a proper case he might pay the money into Court (*m*).

The trustee might join in a settlement of the wife's funds, and, with the consent of the husband, transfer the same to the trustees of an existing settlement, and such a settlement would be as valid as if directed to be made by the Court (*n*).

Property subject to the equity.—The wife's equity extended to all property to which she was entitled otherwise than for her separate use, whether vested in her in interest before or after marriage, and which the husband has not reduced into possession. A wife has the same equity in respect of a life interest in a fund as when she is entitled to an absolute interest (*p*).

Where an equitable estate in fee descended on a married woman, the Court, by virtue of her equity to a settlement, has settled the estate on her during her life, but has refused to interfere with the possible estate by curtesy of the husband (*q*).

And even before the Judicature Acts where the property, though in its nature legal, became, from collateral circumstances, the subject

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(*g*) *Osborn* v. *Morgan*, 9 Ha. 432.
(*h*) Sections 36—44 of the Act of 1925.
(*i*) Section 40.
(*k*) *Ward* v. *W.*, 14 Ch. D. 508.
(*kk*) See *Fowke* v. *Draycott*, 28 Ch. D. 996.
(*l*) *Re Swan*, 2 Hem. & M. 34; *Elibank* v. *Montolieu*, *ante*.
(*m*) *Re Bendyshe*, 3 Jur. (N.S.) 727.
(*n*) *Montefiore* v. *Behrens*, 1 Eq. at p. 172; *Re Roberts' T.*, 38 L. J. Ch. 708.
(*p*) *Taunton* v. *Morris*, 11 Ch. D. 779.
(*q*) *Smith* v. *Matthews*, 3 De G. F. & J. 139.

of a suit in equity, apparently the wife's equity to a settlement would have attached (*r*).

In *Fowke* v. *Draycott* (*s*), a woman married in 1858, was entitled to a share in an estate in fee. After 1870 she ceased to live with her husband on account of his cruelty, and in 1882 she purported to convey her share in the estate, under section 91 of the Fines and Recoveries Act, to A in fee, her husband not joining. In 1883 her husband commenced an action against A, his wife, and others claiming to be entitled to the rents and profits of her share. North, J., held his common law right to the rents during the coverture was not affected by his wife's alienation, but that the wife asserting her equity, she was entitled to enjoy the benefit of the rents, whether her *estate was legal or equitable.*

A wife had no equity to a settlement as against the assignees for value of her husband's interest in land of which she is seised for an estate of inheritance in fee (*t*).

But she was entitled to a settlement out of her *trust term in land*, not only as against her husband, but also against his assignee for valuable consideration (*u*).

In *Clark* v. *Cook* (*x*), a husband and wife, by deed acknowledged, demised freeholds of the wife to a mortgagee by way of trust, the trusts being to apply the rents and profits in payment of certain premiums of insurance, and of the interest on the mortgage debt, and then in reduction of the principal, until it should be paid off. The husband took the benefit of the Insolvent Debtors Act. It was held by Knight-Bruce, V.-C., in a suit for redemption, instituted by the assignee of the husband against the mortgagee, that the latter was chargeable with the surplus rents which he allowed to the insolvent's wife for her maintenance. "I cannot help suspecting," said his Honour, "that the wife might have had all that has been paid to her if a proper application had been made to the Court."

A wife is entitled to a settlement out of a life interest in property to which her husband is entitled in her right, as against his assignees in bankruptcy or insolvency, for the *general* assignee

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(*r*) *Sturgis* v. *Champneys*, 5 My. & C. 97; and see *Gleaves* v. *Paine*, 1 De G. J. & S. 87; *Bonfield* v. *Hassell*, 32 B. 217; *Barnes* v. *Robinson*, 11 W. R. 276; cf. *Re Briant*, 39 Ch. D., at p. 476; *Re Howard*, 13 R. 233.

(*s*) 29 Ch. D. 996, 1003.

(*t*) *Durham* v. *Crackles*, 8 Jur. (N.S.) 1174; *Life Association, etc.* v. *Siddal*, 3 De G. F. & J. 271; *Newenham* v. *Pemberton*, 17 L. J. Ch. 99.

(*u*) *Hanson* v. *Keating*, 4 Ha. 1.

(*x*) 3 De G. & Sm. 333.

of the husband is in the same position as the husband himself, and as against him there can be no distinction between corpus and income (*y*). The wife is also entitled to a settlement or maintenance out of her life interest, when she is *deserted* by her husband (*z*). But she is not entitled to a settlement out of a life interest *when she is living with and is maintained by her husband*, who is neither bankrupt nor insolvent (*a*). Nor is she entitled to a settlement out of property in which she has a life interest, as against a person to whom her husband has assigned it for value previous to his insolvency or his desertion of her (*b*) : *Secus*, if her interest is absolute (*c*). In *Tidd* v. *Lister* (*d*), it was held that a married woman whose husband did not maintain her, was not entitled, as against a *particular assignee* of the husband, to a settlement, or maintenance out of the income of the real and personal estate to which she was entitled in equity for her life, and his decision was on appeal reluctantly affirmed by Cranworth, C. (*e*). Even in the case of the wife's estate of inheritance, the husband's assignment by way of mortgage has prevailed to the extent of his life interest (*f*). And the husband's assignment for value, when maintaining his wife, of income to which he becomes entitled in her right, will be effectual to deprive her of her equity to a settlement as against the assignee for value, though the interest of the wife at the time of the assignment was reversionary (*g*).

In the case of the *reversionary personal* property of a married woman, the question whether a wife was entitled to a settlement could only be decided when the reversionary property fell into possession (*h*).

(*y*) *Taunton* v. *Morris*, 11 Ch. D. 780; and see *Lamb* v. *Milnes*, 5 V. 517; *Brown* v. *Clark*, 3 V. 166; *Jacobs* v. *Amyatt*, 1 Madd. 376 (n.); *Squires* v. *Ashford*, 23 B. 132; *Sturgis* v. *Champneys*, 5 My. & C. 97; *Koeber* v. *Sturgis*, 22 B. 588.

(*z*) *Gilchrist* v. *Cator*, 1 De G. & Sm. 188, at p. 150.

(*a*) *Vaughan* v. *Buck*, 13 Si. 404, *sed vide Wilkinson* v. *Charlesworth*, 10 B. 324.

(*b*) *Elliott* v. *Cordell*, 5 Madd. 149; but see *Stiffe* v. *Everitt*, 1 My. & C. 37, the assignment could not be operative apart from Malins' Act beyond the joint lives of the husband and wife; and cf. *Stanton* v. *Hall*, 2 Russ. & M. 175 (where the wife's life interest was determinable on the husband's death); *Harley* v. *H.*, 10 Ha. 325; *Re Godfrey's Trusts*, 1 Ir. R. Eq. 531.

(*c*) *Scott* v. *Spashett*, 3 Mac. & G. 589. (*d*) 10 Ha. 140.

(*e*) 3 De G. M. & G. 857, 870; see also *Durham* v. *Crackles*, 11 W. R. 138; *Re Duffy's T.*, 28 B. 386; but see *Taunton* v. *Morris*, 11 Ch. D. 780.

(*f*) *Durham* v. *Crackles*, 11 W. R. 138.

(*g*) *Life Association, etc.*, v. *Siddal*, 3 De G. F. & J. 271; *Re Carr's T.*, 12 Eq. 609.

(*h*) *Osborn* v. *Morgan*, 9 Ha. 432, 434.

Murray v. Lord Elibank.

Rights of children.—It has always been the practice when a woman insisted upon her equity to a settlement, out of property to which she was absolutely entitled, and not out of a mere *life* interest, to extend the settlement to her children, although she might have none at the time, and the children of a former marriage would be included in the settlement (*i*).

The equity was personal to the wife. If she died before asserting her right, her children could not insist upon a settlement, the children having no right to a settlement "independent of *contract or decree*" (*k*).

The wife, therefore, might, at any time before the settlement was actually completed, *waive* her right to it, and thus defeat the interests of her children (*l*).

Waiver.—Although the husband, in the event of his wife's death, was bound by a contract or decree for a settlement, yet the wife could, at any time before it was actually made, *waive* her equity (*m*).

The amount to be settled.—The usual practice has been to settle one-half (*n*). But "there is no doubt that the rule of the Court . . . was in former times supposed to be, that the fund should be equally divided between the wife and children on the one hand, and the husband on the other. It is equally clear that in modern times that rule has been considerably relaxed, and that as regards the shares in which the fund should be divided, considerable latitude has been assumed by the Court . . . *so as to admit of the discretion of the Court being exercised in each individual case*" (*o*). And the discretion would not be interfered with unless some facts had been excluded, or some principle violated (*p*).

As a general rule the Court would not settle the whole fund unless (1) the husband was insolvent or unable to support the wife, or (2) had been guilty of gross misconduct (*q*).

The Settlement.—A wife is as much entitled to a settlement out

(*i*) *Johnson* v. *J.*, 1 J. & W. 472; *Re Grant*, 14 W. R. 191; *Conington* v. *Gilliat*, 25 W. R. 69.

(*k*) *Per* Plumer, V.-C., in *Lloyd* v. *Williams*, 1 Madd. 467; and see *Roberts* v. *Cooper*, [1891] 2 Ch. 348.

(*l*) *Hodgens* v. *H.*, 11 Bli. (N.S.) 62, 104; *Murray* v. *Elibank*, *supra*.

(*m*) *Fenner* v. *Taylor*, 2 Russ. & M. 190; *Baldwin* v. *B.*, 5 De G. & Sm. 319; *Lovett* v. *L.*, John. 118; *Druitt* v. *Willens*, 23 L. R. Ir. 436.

(*n*) *Spirett* v. *Willows*, L. R. 1 Ch., at p. 522; L. R. 4 Ch. 407.

(*o*) *Per* Cairns, L.J., *Re Suggitt's Trusts*, L. R. 3 Ch. 215, 217; *Taunton* v. v. *Morris*, 11 Ch. D. 779; *Roberts* v. *Cooper*, [1891] 2 Ch. 339.

(*p*) *Per* Bowen, L.J., *Roberts* v. *Cooper*, [1891] 2 Ch., at p. 345.

(*q*) *Re Suggitt's Trusts*, *supra*; *Reid* v. *R.*, 33 Ch. D. 220.

of a small fund as out of a large one, although it be so small that her consent might not be required for payment to the husband by reason of its smallness (*r*). In the absence of special circumstances, the income of a *personal fund* would be given to the wife to her separate use for life, without power of anticipation (*s*), and subject thereto upon trust for her children, whether by present or future husband, as the wife and husband should by deed, with or without power of revocation, jointly appoint, and in default of such appointment, etc., then as the wife, if she survived her husband, should appoint, and in default of appointment and so far, etc., then to her children who being sons should attain twenty-one, or being daughters attain that age or marry (*t*); and if there should be no such child, then, in the absence of special circumstances, the Court would not defeat the legal right of the husband but give the fund to him whether he survived his wife or not (*u*), or, his particular assignee for value (*x*), or general assignees (*y*), absolutely (*z*).

Where the husband assents to the whole of the fund belonging to the wife being settled, in the absence of special circumstances, a life interest (determinable on bankruptcy or alienation) was usually given to the husband after the wife's death (*a*).

In order to avoid the expense of a settlement where the fund was small, it would be ordered to be brought into Court, if not there already, and the Court would direct the dividends to be paid to the wife for her separate use for life, and either declare the trusts after her death (*b*), or give liberty to the persons entitled at her death to apply (*c*).

Reduction into possession by Husband.—The actual reduction into possession by the husband of the rents and profits of his wife,

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(*r*) *Re Cutler*, 14 B. 220; *Re Kincaid's T.*, 1 Drew. 326.

(*s*) *Spirett* v. *Willows*, L. R. 4 Ch. 407.

(*t*) Seton (7th ed.), at p. 907; *Re Briant*, 39 Ch. D., at p. 482, where the power to appoint was limited to the wife by will; *Croxton* v. *May*, 9 Eq. 408, 409; *Gent* v. *Harris*, 10 Ha. 383; *Re Gowan*, 17 Ch. D. 778.

(*u*) *Walsh* v. *Wason*, L. R. 8 Ch. 482; Seton (7th ed.), at p. 907.

(*x*) *Carter* v. *Taggart*, 1 De G. M. & G. 286; and see Form of Order, 5 De G. & Sm. 55; *Re Tubb's E.*, 8 W. R. 270; *Ward* v. *Yates*, 1 Dr. & Sm. 80.

(*y*) *Ex p. Pugh*, 1 Dr. 202; *Gent* v. *Harris*, 10 Ha. 383, 384.

(*z*) *Spirett* v. *Willows*, *supra*.

(*a*) *Smithers* v. *Green*, Seton (7th ed.), 903 and 907.

(*b*) *Bagshaw* v. *Winter*, 5 De G. & Sm. 468; and see *Guy* v. *Pearkes*, 18 V. 195, a case of desertion referred to in *Re Suggitt's Trusts*, L. R. 3 Ch., at p. 219; *Re Ford*, 32 B. 621; *Watson* v. *Marshall*, 17 B. 363; *Walker* v. *Drury*, 17 B. 484; *Wright* v. *King*, 18 B. 461.

(*c*) *Re Cutler*, 14 B. 220, 222.

or of any fund belonging to her, or of her choses in action would defeat the wife's right to a settlement thereout; and, as laid down by Lord Eldon, in the principal case, "previously to a bill, a trustee, who has the wife's property, real or personal, may pay the rents and profits, and may hand over the personal estate to the husband, but not if the bill has been filed; and if the husband, or those claiming under him, can obtain the property of the wife by an action at law, equity will not by injunction prevent them from doing so" (*d*). But after writ issued, trustees could not safely make any payments to the husband (*e*), and could not be advised to act without first consulting the Court (*f*). As to what constitutes reduction into possession, see notes to *Hornsby* v. *Lee*, *ante*.

Adequate Settlement.—The equity would be barred by an *adequate settlement* having been made upon her, but not by an inadequate settlement, unless it be by an express stipulation before marriage (*g*).

Fraud of Wife.—The Court will not allow the equity to be made an instrument of fraud (*h*). So where a woman at the time of her marriage owed more than the whole amount of her property, she would have no equity to a settlement out of it as against the assignees of her husband, in whose bankruptcy her debts are proved (*i*). And a married woman might by fraud preclude herself from claiming her equity to a settlement (*k*).

Adultery of Wife.—If the wife be living in adultery, apart from her husband, she could not, except under very peculiar circumstances (*l*), insist upon her equity to a settlement (*m*); but even then it seems the husband would not be allowed to receive the whole of her property, while he does not maintain her (*n*).

Foreign Domicil of Husband.—The equity does not arise where the domicil of the husband is foreign, and his country does not recognise such a right (*o*).

(*d*) See *Milner* v. *Wilmer*, 2 P. W. 641; *Jewson* v. *Moulson*, 2 Atk. 420; *Allday* v. *Fletcher*, 1 De G. & J. 82; *Re Swan*, 2 Hem. & M. 34, 37; *Hornsby* v *Lee*, *supra*, p. 158.

(*e*) *Macaulay* v. *Philips*, 4 V. 18; *De la Garde* v. *Lempriere*, 6 B. 344, 347.

(*f*) Lewin (12th ed.), at p. 953.

(*g*) *Salwey* v. *S.*, Amb. 692; *Garforth* v. *Bradley*, 2 Ves. Sen. 675; *Spirett* v. *Willows*, L. R. 1 Ch. 520, L. R. 4 Ch. 407.

(*h*) *Re Lush's T.*, L. R. 4 Ch. 591. (*i*) *Bonner* v. *B.*, 17 B. 86.

(*k*) *Re Lush's T.*, L. R. 4 Ch. 591; *Cahill* v. *C.*, 8 A. C. 437; and see *Roberts* v. *Cooper*, [1891] 2 Ch. 335. (*l*) *Re Lewin's T.*, 20 B. 378.

(*m*) *Carr* v. *Eastabrooke*, 4 V. 146. (*n*) *Ball* v. *Montgomery*, 2 Ves. 191.

(*o*) *Campbell* v. *French*, 3 V. 321; *Anstruther* v. *Adair*, 2 My. & K. 513; *Re Marsland*, 34 W. R. 540.

HULME *v.* TENANT.

1778. Reported 1 Bro. Ch. 16.

Wife's Separate Property.

Bond of a feme covert jointly with her husband, shall bind her separate property.

A BILL was filed by the obligee of a bond, to secure £180 entered into by the defendants, husband and wife, against the husband, wife, and her surviving trustee, to recover the sums secured out of the wife's separate estate.

Upon the marriage, the estates of the wife had been conveyed to trustees; one part, consisting of freehold and leasehold lands, in trust to *receive and pay the rents and profits to the wife for her separate use*, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint; in default of appointment, to the use and behoof of her heirs and assigns; other parts to be sold, and out of the produce, £1,000 to be laid out according to the directions of the wife, the interest and profits to be paid to her, and the principal *to her, or her order, by note or writing under her hand;* and for want of such appointment, to her executors, administrators, and assigns.

This £1,000 had been raised, and the whole, or the greatest part applied, so that the question in the cause was with respect to the remedy against the other estate.

In 1769, the husband borrowed of the plaintiff, Mrs. Hulme, £50 upon his and his wife's bond. In 1770, having occasion for a further sum, the wife herself applied to the plaintiff, and borrowed £130, paid the interest due upon the former sum of £50, and [the husband and wife] gave a new bond for the £180.

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The cause had been heard before Lord Bathurst, who dismissed the bill. It came on now to be re-heard.

Mr. Mansfield opened for the plaintiff.

Mr. Attorney-General (Wedderburn) and Mr. Selwyn for the defendants.

Lord Chancellor Thurlow.—My doubt arises principally upon the form of the relief, rather than the principles upon which the bill is brought; it is a bill brought by the obligee upon a joint bond by husband and wife for £180 to recover that sum out of the separate property of the wife. It is brought against the wife, the husband, and the trustees, for attaining the most extensive and perfect relief which the situation of her separate property will enable her or her trustees to afford.

The question is, what sort of execution this Court will award against that separate property? It is created by deed, and is real estate conveyed to trustees, as to a considerable part of it, in trust to receive and pay the rents to the wife, and to convey the estates themselves according to the appointment of the wife, by her last will and testament in writing, or by deed or writing under her hand and seal, executed in the presence of two or more witnesses; and, for want of such declaration or appointment, to the use and behoof of the wife, her heirs and assigns; as to other parts, in trust, to be sold, and out of the produce of the sale, £1,000 to be retained by the trustees, to be laid out according to the directions of the wife, the profits to be paid to her, and the principal to her or her order, by note or writing under her hand; and for want of such appointment, to her executors, administrators, and assigns.

The rule laid down in *Peacock* v. *Monk* (*a*) *that a feme covert, acting with respect to her separate property, is competent to act in all respects as if she was a feme sole* is the proper rule, and necessary to support the decisions on this subject. The consequence was that, in *Allen* v. *Papworth* (*b*), where a bill

(*a*) 2 Ves. Sen. 190. (*b*) 1 Ves. Sen. 163.

was brought by husband and wife for an account, the wife, together with her husband, submitting that the profits of her separate estate should be applied to pay the husband's debts, she was bound by that submission, and the profits of her separate estate were by decree directed to be so applied. In *Grigby* v. *Cox* (*c*), where the wife had contracted to sell her separate estate, being authorised by settlement to dispose of it, the Court bound her, as a person equally competent as if sole, to a specific performance of that contract: I take it, therefore, it is impossible to say but *that a feme covert is competent to act as a feme sole, with respect to her separate property, where settled to her separate use.*

But the question here goes a little beyond that; it is not only how far she may act upon her separate property: I have no doubt about that; but *the question is, how far her general personal engagement shall be executed out of her separate property.* If she had by instrument contracted that this or that portion of her separate estate should be disposed of in this or that way, I think she and her trustees might have been decreed to make that disposition; but if she enters into an engagement, which would make a *feme sole* liable to the whole extent of the contract as to her person, etc., in every respect, it is clear such general engagement, entered into by a *feme covert*, will not bind her as such. It is not like the case of an infant, who is incapable of acting; but in respect to a *feme covert*, determined cases seem to go thus far, *that the general engagement of the wife shall operate upon her personal property, shall apply to the rents and profits of her real estate, and that her trustees shall be obliged to apply personal estate, and rents and profits when they arise, to the satisfaction of such general engagement; but this Court has not used any direct process against the separate estate of the wife, and the manner of coming at the separate property of the wife has been by decree to bind the trustees, as to personal estate in their hands, or rents and profits, according to the exigencies of justice, or of the engagement of the wife, to be*

(*c*) 1 Ves. Sen. 517.

carried into execution. I know of no case which has gone further than that. Suppose the wife to have power, by settlement, to dispose of her real estate to any uses she shall think fit, yet the trustees must make the formal instrument, without which the estate cannot pass. I know of no case where the general engagement of the wife has been carried to the extent of decreeing that the trustees of her real estate shall make conveyance of that real estate, and by sale, mortgage, or otherwise, raise the money to satisfy that general engagement on the part of the wife. It may be difficult to give relief here without doing something of that kind, because that part of the real estate which was to be sold has been sold, and the money has been applied, with the direction of the wife, by the hand of the trustee, who consequently is no longer liable as to that sum; so that so far as the £1,000, it seems out of the reach of this Court, the trustee alleging that the money is paid, or not remaining in his hands.—[Mr. Ambler.—Only part paid over.] —I believe there is no instance of a personal decree against a *feme covert*, for payment of any sum whatever. Though her separate personal property is liable, yet the decree is to fetch forth her separate estate, and make it liable to her engagement. No lease found in the hands of the trustee is now before the Court; we cannot come at it. As a bond it is void, otherwise an extent might have gone.

July 28, 1778.

Lord Chancellor Thurlow.—I have no doubt about this principle, that, *if a Court of equity says a* feme covert *may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements; as, for instance, for payment of debts, etc.* But, although the remedy here is more extensive than in a Court of law, I do not find the Court has ever ordered a power to be executed; it has industriously stopped short of so doing, and has only given a remedy by stopping the fund, where the power was executed; therefore, I cannot order the *feme covert* to execute her power, but I am exceedingly clear that the leasehold estate will be liable.

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It stood referred to the Master (*d*) to take an account of the rents and profits of the leasehold estates; but before any report, the parties came to a compromise, upon the defendant Frances paying the principal sum borrowed, with interest, without any costs.

NOTES.

The equitable doctrine of the separate use, although of great interest historically, has been rendered by statute of small and rapidly diminishing importance. Exceptions to the husband's common law rights in his wife's property were created by the Divorce Act, 1857, and the Married Women's Property Act, 1870; but the Married Women's Property Act, 1882, is far more comprehensive. Under this Act, a married woman's property belongs to her for her separate use, in cases where either the marriage takes place, or the wife's right to the property accrues, after 1882. The equitable doctrine, therefore, of the separate use, apart from statute, can only apply where the marriage and the accruer of the wife's title to the property both took place before January 1, 1883, and where the case does not fall within the earlier statutory exceptions. The Notes in this work to the case of *Hulme* v. *Tenant* have accordingly been greatly abbreviated.

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   (b) What words are sufficient to create a separate use, p. 561.
   (c) Separate estate by implication, p. 564.
2. Statutory extension of the doctrine of separate estate, p. 565.
3. Wife's power of disposition over property given or settled to her separate use absolutely, p. 574.
4. Liability of corpus of married woman's property when she has a life interest with a power, p. 575.
5. (a) Liability of separate estate for a general engagement, p. 577.
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8. Loans by wife to husband and exoneration of wife's separate estate, p. 585.
9. Wife's ante-nuptial debts and liabilities, p. 588.
10. Liability and devolution of separate estate after death, p. 593.
11. Savings and arrears of separate estate, p. 595.
12. Protection and recovery of separate property, p. 596.
13. Restraint upon anticipation or alienation, p. 597.
14. Marriage settlements and section 19 of the Act of 1882 and section 2 of the Act of 1907, p. 602.
15. Duration and extent of separate use and of restraint on anticipation, p. 604.
16. Married woman trustee, p. 611.
17. Pin-money, p. 612.
18. Paraphernalia, p. 613.

(*d*) See order made by Thurlow, C., extracted from the Registrar's Book in note to *Johnson* v. *Gallagher*, 3 De G. F. & J., at p. 502.

Hulme v. Tenant.

1. Separate Estate independent of Statute.

Generally.—"That at *law* a *feme covert* cannot in any way be sued, even for necessaries, is certain. Bind herself, or her husband, by specialty, she cannot; and, although living with him, and not allowed necessaries, or apart from him, whether on an insufficient allowance or an unpaid allowance, she may so far bind him that those who furnish her with articles of subsistence may sue him; yet, even in respect of these, she herself is free from all suit. This is her position of disability, or immunity at law; and this is now clearly settled. Her separate existence is not contemplated; it is merged by the coverture in that of her husband. But in *equity* the case is wholly different. Her separate existence, both as regards her liabilities and her rights, is here abundantly acknowledged; not, indeed, that her person can be made liable, but her property may, and it may be reached through a suit instituted against herself and trustees" (*e*).

"In former years . . . Judges of what used to be called the Common Law Courts of this realm delighted in applying rigidly and strictly a series of rules and maxims which their predecessors had delighted themselves in devising, although they did not always commend themselves to the apprehension of the million. Amongst those maxims was one by which a married woman was held incapable of taking a gift either from her husband or a stranger. . . . But the Court of Chancery (a very great Court in its day, although it has now ceased to exist) invented that blessed word and thing 'the separate use of a married woman'" (*f*). And in order to prevent any undue exercise of marital influence detrimental to its enjoyment, Courts of equity have also in comparatively recent times allowed the introduction of a restraint upon her anticipation or alienation of property so settled—the separate use and the restraint upon anticipation or alienation being both *co-extensive with her coverture*. And this equitable doctrine of separate use has been extended by the various statutes hereinafter referred to.

The jurisdiction of the Court of Chancery is now transferred to the High Court of Justice; law and equity are to be administered concurrently, all equitable rights are to be recognised by all the Courts, and where there is any conflict or variance between the

(*e*) *Per* Lord Brougham, L.C., in *Murray* v. *Barlee*, 3 My. & K., at pp. 220—2.
(*f*) *Per* James, L.J., *Ashworth* v. *Outram*, 5 Ch. D., at p. 941.

rules of equity and the rules of the common law, the former are to prevail (*g*).

In cases not falling within the Married Women's Property Acts, if real or personal property be given to, or settled upon, a married woman for her separate use, without the interposition of trustees, still in equity the intention of the testator or settlor will be effectuated, and the wife's interest protected by the conversion of the husband into a trustee for her (*h*); and in such cases the Statutes of Limitations will not run in favour of the husband against the wife (*i*).

A husband may also give property to trustees, or make himself a trustee for the separate use of his wife. But in order to constitute a gift between husband and wife, there must be a clear and irrevocable gift to a trustee for the wife, or some clear and distinct act by the husband, by which he has divested himself of his property or engaged to hold it as a trustee for his wife (*k*), a mere imperfect gift, as distinguished from and not amounting to a declaration of trust, not being sufficient for the purpose (*l*).

Under the Law of Property Act, 1925, s. 72, sub-s. 2 (taking the place of the Conveyancing and Law of Property Act, 1881, s. 50), freehold land or a thing in action may now be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person.

A wife will have the benefit of any outlay by her husband upon real estate settled to her separate use. If, for instance, he builds houses upon it with his own money, the houses so built will become the wife's, and her interest in them will be to her separate use (*m*).

What Words are sufficient to Create a Separate Use.—No particular *form of words* is necessary in order to vest property in a married woman to her separate use (*n*). It has been held that the

(*g*) Supreme Court of Judicature (Consolidation) Act, 1925, ss. 36—40, and section 44, taking the place of corresponding provisions in the Judicature Act, 1873.

(*h*) *Parker* v. *Brooke*, 9 V. 583; *Rich* v. *Cockell*, 9 V. 369; *Ashworth* v. *Outram*, 5 Ch. D., at p. 941; *Ex p. Sibeth*, 14 Q. B. D. 417.

(*i*) *Wassell* v. *Leggatt*, [1896] 1 Ch. 554; *McArdle* v. *Gaughran*, [1903] 1 Ir. R. 106.

(*k*) *Mews* v. *M.*, 15 B. 529; *Parker* v. *Lechmere*, 12 Ch. D. 256; *Cowper's Case*, cited *Graham* v. *Londonderry*, 3 Atk. 393; *Walter* v. *Hodge*, 2 Swans. 92; *Ashworth* v. *Outram*, 5 Ch. D. 923; *Lovell* v. *Newton*, 4 C. P. D. 7.

(*l*) *Re Breton's Estate*, 17 Ch. D. 416; *Milroy* v. *Lord*, 4 De G. F. & J. 264; *Re Whittaker*, 21 Ch. D. 657; and see notes to *Ellison* v. *E.*, *ante*.

(*m*) *Barrack* v. *M'Culloch*, 3 Kay & J. 119, 120.

(*n*) *Stanton* v. *Hall*, 2 Russ. & M. 180; *Re Peacock's T.*, 10 Ch. D. 490.

marital rights of the husband will be defeated if there is a gift or settlement of property to his wife or her trustees for her "separate use" (*o*); "sole and separate use" (*p*); or "for her own use and at her own disposal" (*q*); "for her sole use and disposal" (*r*); "for her own use, independent of her husband" (*s*); "for her own use and benefit, independent of any other person" (*t*); "for her livelihood" (*u*); a bequest to a married woman "for her absolute use and benefit" (*x*); or, "that she should receive and enjoy the issue and profits" (*y*); a direction that "the interests and profits be paid to her, and the principal to her, or to her order by note in writing under her hand" (*z*); or, "her receipt to be a sufficient discharge" (*a*); or where trustees are directed to apply the income of a fund in their discretion, and without being answerable to any one "for the maintenance and support of a married woman" (*b*); or, "to be delivered to her on demand" (*c*); or where the husband "is to have no control" (*d*).

In the case, however, of *Gilbert* v. *Lewis* (*e*), it was held by Westbury, C., that a devise to a widow "for her sole use and benefit" *without the intervention of trustees* did not give her a separate estate. It may now be considered to be established that the word "sole" in a will has not a fixed technical meaning like the word "separate," and will not of itself exclude the marital right (*f*). But the interposition of trustees *may* give to such words as "sole benefit" the same technical meaning as the word "separate" (*g*).

(*o*) *Massy* v. *Rowen*, L. R. 4 H. L. 294, 299, 300.

(*p*) *Parker* v. *Brooke*, 9 V. 583; *Archer* v. *Rorke*, 7 Ir. Eq. R. 478; and see *Hulme* v. *Tenant*, *supra*.

(*q*) *Pritchard* v. *Ames*, 1 T. & R. 222.

(*r*) *Bland* v. *Dawes*, 17 Ch. D. 794.

(*s*) *Wagstaffe* v. *Smith*, 9 V. 520.

(*t*) *Margetts* v. *Barringer*, 7 Si. 482; *Glover* v. *Hall*, 16 Si. 568.

(*u*) *Darley* v. *D.*, 3 Atk. 399; *Cape* v. *C.*, 2 Y. & C. Ex. C. 543; but see *Lee* v. *Prieaux*, 3 Bro. Ch. 383; *Wardle* v. *Claxton*, 9 Si. 324.

(*x*) *Negus* v. *Jones*, 1 C. & E. 52.

(*y*) *Tyrrell* v. *Hope*, 2 Atk. 558.

(*z*) *Hulme* v. *Tenant*, *supra*.

(*a*) *Lee* v. *Prieaux*, 3 Bro. Ch. 381; *Stanton* v. *Hall*, *supra*; *Re Molyneux's Estate*, 6 Ir. R. Eq. 411; *Re Lorimer*, 12 B. 521; *Surman* v. *Wharton*, [1891] 1 Q. B. 491.

(*b*) *Austin* v. *A.*, 4 Ch. D. 233; *Re Peacock's T.*, 10 Ch. D. 490.

(*c*) *Dixon* v. *Olmius*, 2 Cox, 414.

(*d*) *Edwards* v. *Jones*, 14 W. R. 815.

(*e*) 1 De G. J. & S. 38.

(*f*) *Lewis* v. *Matthews*, 2 Eq. 177; *Massy* v. *Rowen*, L. R. 4 H. L. 288; *Green* v. *Marsden*, 1 Drew. 646; *Farrow* v. *Smith*, W. N. (77) 21; *Re Amies*, W. N. (80) 16.

(*g*) *Adamson* v. *Armitage*, 19 V. 416; *Gilbert* v. *Lewis*, 1 De G. J. & S. 38; but cf. *Massy* v. *Rowen*, L. R. 4 H. L. 288.

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Where a testator, after giving his residuary property to two nieces, added, "I confine my said legacies hereinbefore mentioned, to be given to my nieces and their children, *without comprehending their husbands*, unless they, my said nieces or either of them, should die without issue," Romilly, M.R., was of opinion that the only way to give effect to these words was to give the residue between the nieces equally for their *separate* use for life, and after their deaths to their children, and if they had no children, then to the nieces absolutely (*h*).

Where a testatrix devised a freehold estate to trustees for the use and benefit of her daughter, who was to receive the rents and profits from the tenants herself, while she lived, whether married or single, and she also directed that *no sale or mortgage should be made* of the estate or the rents arising from it during the life of her daughter, it was held that the devise amounted to a gift to the *separate use* of the daughter *without power of anticipation* (*i*). An indefinite bequest of the *interest* of a fund to a woman to her separate use, will give to her the *capital* also to her separate use (*k*).

In *Troutbeck* v. *Boughey* (*l*) a testator gave all his real and personal estate to trustees in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the *principal moneys, rents, issues, profits, interest, dividends and proceeds* which his wife and daughter, or either of them, should be entitled to under his will, should be paid into their own proper hands as the same *became due*, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the *receipt* alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees. Kindersley, V.-C., on the ground that the words in italics were inapplicable to the corpus of real estate, held that the corpus of the real estate was not given to the separate use of the testator's daughter.

Although generally a married woman's separate estate is given to her *for life only*, she may have an *absolute interest* in personal

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(*h*) *Dawson* v. *Bourne*, 16 B. 29.

(*i*) *Goulder* v. *Camm*, 1 De G. F. & J. 146.

(*k*) *Humphrey* v. *H.*, 1 Si. (N.S.) 536.

(*l*) 2 Eq. 534; and see *Re Bown*, 27 Ch. D. 411; *Johnson* v. *J.*, 35 Ch. D., at p. 349; *Re Grey's Settlement*, 34 Ch. D. 712; *Re Tippett, etc.*, 37 Ch. D. 444; and *Re Fearon*, 45 W. R. 232.

property, or any ordinary estate in real estate, such as an estate in fee simple (*m*) or fee tail (*n*) settled to her separate use; and where property is settled to a married woman's separate use for life with power to dispose of it by deed or will, and in default to her, her executors and administrators, it is, in effect, her separate property absolutely (*o*).

Separate Estate by Implication.—Where under a trust deed for providing pensions (amongst other objects) for the widows of clerks in the East India Company's service, there was a provision that the pension should be paid "to provide a comfortable maintenance" for the widows, and that it "should not be disposed of or incumbered either directly or indirectly," it was held that a widow of a clerk was, as against a second husband, entitled to her pension to her separate use (*p*).

Where a husband in taking proceedings with reference to property of his wife makes her a defendant, he thereby admits that the property is her separate estate (*q*). But a separate use will not be inferred merely from a restraint on anticipation (*r*).

Where a precatory trust has been created by will in favour of "children" *simpliciter*, the trustee may, in executing the trust, limit the shares of the daughters to their separate use (*s*).

Arrangements or Agreements between Husband and Wife.—If a husband either expressly or impliedly agrees that his wife shall carry on a business for her own benefit separately from and independently of him, which is always a question dependent on the facts of each case, then the trade becomes her separate property, and everything that is incident to and connected with the trade becomes part of that separate trade, and the husband is, if and so far as it is necessary, a trustee of everything which was devoted to that trade of which he allowed the wife to be the separate owner (*t*). And it is immaterial whether the business were one which the wife had before marriage or one which she had established

(*m*) *Taylor* v. *Meads*, 4 De G. J. & S. 597, 607.
(*n*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.
(*o*) *The London Chartered Bank of Australia* v. *Lemprière*, L. R. 4 P. C. 572.
(*p*) *Re Peacock's T.*, 10 Ch. D. 490.
(*q*) *Earl* v. *Ferris*, 19 B. 67; *Re Martin*, W. N. (84) 164; *Baker* v. *Newton*, 2 B. 112.
(*r*) *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; but see *Re Lumley*, [1896] 2 Ch. 690.
(*s*) *Willis* v. *Kymer*, 7 Ch. D. 181.
(*t*) *Ashworth* v. *Outram*, 5 Ch. D. 923; *Pearse* v. *P.*, 22 W. R. 69; *Slanning* v. *Style*, 3 P. W. 334.

after the marriage with the consent of her husband (*u*), or which she had established before and carried on after (*x*), or that the business was one carried on formerly by the husband before he became incapacitated, as for instance by habitual drunkenness, from carrying it on (*y*). If the permission by the husband to his wife to carry on business be given *before* marriage, it will not only be obligatory upon the husband, but also upon his creditors; if it be given *after* marriage, it will be binding as between him and her but not as against his creditors (*z*).

Where a husband and wife agree to live separate and not to interfere with any property which each may subsequently acquire, the subsequently-acquired property of the wife will be considered as her separate estate (*a*).

2. Statutory Extension of the Doctrine of Separate Estate.

The Matrimonial Causes Act, 1857 (*b*), contains provisions protecting the earnings of a married woman deserted by her husband, and also property acquired by a wife judicially separated.

The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93).

Under this Act, the earnings of any married woman acquired after the passing of the Act, in any employment, occupation, or trade in which she is engaged, or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such earnings, were to be taken to be property held and settled to her separate use, and, in the case of any woman married after the passing of the Act, she was to be entitled for her separate use to any sum of money (not exceeding £200) coming to her during the marriage under any deed or will, and to any personal estate to which she might become entitled as one of the next-of-kin of an intestate, and also to the rents and profits of any real estate descending upon her as heiress of an intestate.

(*u*) *Ashworth* v. *Outram*, *supra*.

(*x*) *Re Dearmer*, 53 L. T. 905.

(*y*) *Lovell* v. *Newton*, 4 C. P. D. 7.

(*z*) See *Ashworth* v. *Outram*, 5 Ch. D., at pp. 932, 933, *per* Malins, V.-C. See Married Women's Property Act, 1882, s. 1, sub-ss. 1, 2, 3, 4, and *Ex p. Whitehead*, 14 Q. B. D. 419.

(*a*) *Haddon* v. *Fladgate*, 1 Sw. & Tr. 48; and as to joint accounts, etc., between husband and wife, see *Re Young*, 28 Ch. D. 705.

(*b*) 20 & 21 Vict. c. 85, ss. 21 and 25. See Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39).

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The Married Women's Property Act, 1882.

Section 1, sub-section 1 : "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee."

This sub-section is to be construed with sub-sections 2 and 5 (*c*). It only applies to a disposition by a married woman during coverture; and a will made during coverture would not, under this Act, pass property to which a married woman became entitled after the coverture ended (*d*). But this has been altered by the Married Women's Property Act, 1893, s. 3, mentioned *infra*. The Act does not touch the *devolution* of property on an intestacy (*e*).

Section 1, sub-section 2 : "A married woman shall be capable of entering into and rendering herself liable in respect of and *to the extent of her separate property* on any *contract*, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property (*f*), and not otherwise."

Sub-sections 3 and 4 are repealed by the Married Women's Property Act, 1893.

Section 1, sub-section 5 (*g*) : "Every married woman carrying on a trade (*h*) separately (*i*) from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole*."

In cases prior to the Bankruptcy and Deeds of Arrangement Act, 1913 (now repealed by the Bankruptcy Act, 1914), a married woman possessed of separate estate but not carrying on a trade

(*c*) *Re Cuno*, 43 Ch. D. 12; *Re Harris*, [1909] 2 Ch. 206.
(*d*) *Re Price*, 28 Ch. D. 709.
(*e*) *Re Lambert*, 39 Ch. D. 626; *Hope* v. *H.*, [1892] 2 Ch., at p. 342.
(*f*) *Goatley* v. *Jones*, [1909] 1 Ch. 557.
(*g*) Repealed by Bankruptcy Act, 1914.
(*h*) *Re Long*, [1905] 2 Ir. R. 343.
(*i*) *Re Simon*, [1909] 1 K. B. 201.

separately from her husband was not subject to the operation of the bankruptcy laws (*k*). A bankruptcy notice could not be issued against a married woman trading separately, against whom a creditor had recovered judgment, in the form in *Scott* v. *Morley* (*l*); nor could a receiving order be made against her on the ground of non-compliance with a bankruptcy notice founded upon a judgment obtained against her in the firm's name (*m*). In *Re Armstrong, ex p. Boyd* (*n*), A had carried on trade separately. She had settled (in 1881), before marriage, real estate in trust to pay the rents and profits to herself for life, for her separate use, and after her decease upon trust for such persons as she should by deed or will appoint. Notwithstanding the wording of section 19 of the Act, the trustee in bankruptcy was held entitled to her life estate. Where a married woman entitled to separate estate with a restraint on anticipation trades separately from her husband and becomes bankrupt, her separate estate, subject to the restraint on anticipation, vests in her trustee in bankruptcy, and, on the death of her husband in her lifetime, is assets for her creditors. In such a case the restraint on anticipation is in the nature of an incumbrance which is removed by the death of the husband (*o*). Separate property over which she has only a power of appointment, and which would go to another in default, does not pass to the trustee (*p*).

By the Bankruptcy Act, 1914, however, it is provided that every woman who carries on a trade or business, whether separately from her husband or not, shall be subject to the bankruptcy laws as if she were a *feme sole*; and that where a married woman carries on a trade or business and a final judgment for any amount has been obtained against her, whether or not expressed to be payable out of her separate property, that judgment or order shall be available for bankruptcy proceedings against her by a bankruptcy notice as though she were personally bound to pay the judgment debt or sum ordered to be paid (*q*). By section 2 of the Married Women's

(*k*) *Re Gardiner*, 20 Q. B. D. 249.
(*l*) 20 Q. B. D. 120; *Re Lynes*, [1893] 2 Q. B. 113.
(*m*) *Re Handford & Co.*, [1899] 1 Q. B. 566.
(*n*) 21 Q. B. D. 264.
(*o*) *Re Wheeler*, [1899] 2 Ch. 717.
(*p*) *Re Armstrong, ex p. Gilchrist*, 17 Q. B. D. 521.
(*q*) 4 & 5 Geo. 5, c. 59, s. 125, re-enacting section 12 of 3 & 4 Geo. 5, c. 34. See *Re Hollis & Son*, 112 L. T. 135; *Re Clark*, [1914] 3 K. B. 1095; *Shaw* v. *Allen*, 30 T. L. R. 631; *Re Allen*, [1915] 1 K. B. 285; *Re Reynolds*, [1915] 2 K. B. 186.

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Property Act, 1882 : " Every woman who marries *after the commencement of this Act* shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill."

Sections 3 and 4 are referred to later.

Section 5 : " Every woman *married before the commencement of this Act* shall be entitled to have and to hold and to dispose of in manner aforesaid as her *separate property* all real and personal property, her *title* to which, whether vested or contingent, and whether in possession, reversion, or remainder, *shall accrue after the commencement of this Act*, including any wages, earnings, money, and property so gained or acquired by her as aforesaid."

In a gift of property by will or otherwise to a married woman since the Act of 1882, it is unnecessary to declare that the same shall be for her separate use; and even though the gift is in terms to the married woman free from the control of a named husband, this will not prevent it from also being free from the control of any future husband (*r*). But if a woman married before the Act acquires before its commencement a title whether vested or contingent, in reversion or remainder, to any property, such property does not, on falling into possession after the Act, become her separate estate by this section (*s*), nor *a fortiori* will it become her separate property by a change in its character, as by conversion from realty into personalty under a trust (*t*). Where, under a will, a married woman was entitled at the commencement of the Act as one of the possible next-of-kin of the testator, to be ascertained at the date of the failure of certain prior interests, it was held that she was entitled to the share as her separate estate under the Act, a *spes successionis* not being a title (*u*). The wife has a separate right to damages awarded to her in an action in which her husband was plaintiff with her (*x*) : and her will made before the Act will pass separate estate acquired under the Act (*y*).

(*r*) *Re Williams*, 76 L. T. 150; Lush (3rd ed.), pp. 131, 274.
(*s*) *Reid* v. *R.*, 31 Ch. D. 402. (*t*) *Re Bacon*, [1907] 1 Ch. 475.
(*u*) *Re Parsons*, 45 Ch. D. 51. (*x*) *Beasley* v. *Roney*, [1891] 1 Q. B. 509.
(*y*) *Re Bowen*, [1892] 2 Ch. 291; cf. *Re Cuno*, 43 Ch. D. 12.

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By section 6, deposits in the Post Office or in any other bank, and all stocks, shares, etc., which on January 1, 1883, were standing in a married woman's sole name, are to be deemed to be her separate property until the contrary be shown; and the fact that the same are so standing in her name is sufficient *prima facie* evidence of her power to receive or transfer the same. And by section 7 all such deposits, stocks, shares, etc., as are placed in the sole name of a married woman after January 1, 1883, are to be deemed to be her separate property until the contrary be shown.

By section 10 it is provided that if any investment such as thereinbefore mentioned shall have been made by a married woman by means of moneys of her husband, without his consent, the Court may, upon an application under section 17 of this Act, order such investment, and the dividends thereof, to be transferred and paid respectively to the husband.

By section 11 it is provided (*inter alia*) that "A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use and the same and all benefit thereof shall enure accordingly."

"A policy of assurance effected by any *man* on his own life, and expressed to be for the benefit of his wife, or of his *children*, or of his wife and children, or any of them, or by any *woman* on her own life, and expressed to be for the benefit of her husband, or of her *children*, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid."

The wording of this section differs in some material respects from the wording of the repealed section 10 of the Act of 1870 (*z*). A policy under section 11 can be effected by an unmarried man or woman. Under section 11 where the objects of the trust fail,

(*z*) See the sections contrasted in *Re Turnbull*, [1897] 2 Ch. 415.

as by predecease of the wife or children of the insured person, the policy becomes the property of the insured (*a*).

Under section 10 the objects of the trust and their interests are to be according to the interests expressed in the policy. The Act "refers to the policy for the expression of what is the benefit intended" (*b*). The words "therein named" are the only words in section 11 defining the objects and their interests (*c*). In this respect, however, the two sections have received a similar construction (*d*).

The policy is clearly the governing instrument under section 10 (*e*), and it would seem that it is within the power of the insured to insert such trust for the benefit of the spouse and the children as the insured may desire.

Under a policy for the benefit of the wife and children subject to the provisions of the policy, the wife and children take equally as joint tenants (*f*).

Under a policy for the benefit of wife and children, a wife married after the decease of the wife of the insured living at the date of the insurance is (in the absence of expression of intention to the contrary in the policy (*g*)) entitled to share with the children of both marriages or either of them (*h*). A policy effected by husband and wife, in favour of the survivor, is a valid insurance of the wife's own life within section 11 (*i*).

Sections 12—19 and section 23 are referred to later.

Sections 20 and 21 provide that a married woman, having separate property, is to be liable to the parish for the maintenance of her husband, and of her children, and *grandchildren*, but so that her husband shall not be relieved from any liability imposed upon him by law to maintain her children or grandchildren (*k*). During the lunacy of her husband a wife has an authority of necessity to pledge his credit for necessaries (*l*), and this though

(*a*) *Cleaver* v. *Mutual Reserve Fund, etc.*, [1892] 1 Q. B. 147.
(*b*) *Per* North, J., in *Re Seyton*, 34 Ch. D. 514.
(*c*) *Re Browne*, [1903] 1 Ch. 188.
(*d*) See *Re Parker's Policies*, [1906] 1 Ch. 526.
(*e*) *Re Griffiths*, [1903] 1 Ch. 739.
(*f*) *Re Seyton*, *supra*, not following a *dictum* in *Re Adam's Policy*, 23 Ch. D. 525; *Re Davies*, [1892] 1 Ch. 90.
(*g*) *Re Griffiths*, *supra*.
(*h*) *Re Browne*, [1903] 1 Ch. 188; *Re Parker's Policies*, [1906] 1 Ch. 526.
(*i*) *Griffiths* v. *Fleming*, [1909] 1 K. B. 805.
(*k*) See *Peters* v. *Cowie*, 2 Q. B. D. 131; *Coleman* v. *Overseers, etc.*, 6 Q. B. D. 615.
(*l*) *Read* v. *Legard*, 6 Exch. 636; *Davidson* v. *Wood*, 1 De G. J. & S. 465.

she has separate estate (*m*); but her authority is no higher than in any other case of necessity, and consequently, if a sufficient allowance has been made her, she cannot bind her husband (*n*).

By the Married Women's Property Act, 1908, a married woman having separate property is made subject to all such liability for the maintenance of her parent or parents as a *feme sole* is subject to.

The Married Women's Property Act, 1893.

Section 1. "Every contract hereafter entered into by a married woman otherwise than as agent,

"(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;

"(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and

"(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to (*o*);

"*Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating*" (*p*).

The main object of the section was to get rid of the inconvenient results of the strained construction put upon section 1, subsection 2, of the Act of 1882, by the decision in *Palliser* v. *Gurney* (*q*) and the cases following that decision, especially *Leak* v. *Driffield* (*r*).

The section only applies to a contract made by a married woman after the Act; an acknowledgment of a pre-existing debt is not within the section (*s*). It is a question of fact whether a married woman contracts as agent or not; if she has express

(*m*) *Davidson* v. *Wood*, *supra*.

(*n*) *Richardson* v. *Du Bois*, L. R. 5 Q. B. 51.

(*o*) This removes the difficulty caused by the decision in *Pelton* v. *Harrison*, [1891] 2 Q. B. 422, that property acquired after coverture ceased could not be made liable for debts incurred during coverture unless it were separate estate under a fresh coverture.

(*p*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28.

(*q*) 19 Q. B. D. 519.

(*r*) 24 Q. B. D. 98.

(*s*) *Re Wheeler*, [1904] 2 Ch. 66.

authority to act as her husband's agent, then whether the other contracting party does or does not know that she is married is immaterial, and she is not bound under the Act (*t*).

Section 2. "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just" (*u*).

Section 3. "Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture, whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband."

In *Re Price* (*x*) it was held that the will of a married woman taking effect under section 1, sub-section 1, of the Act of 1882, would not, unless republished after she became discovert, dispose of property acquired after the termination of coverture. This section removes the difficulties caused by that decision, and applies to every will of a married woman dying after the Act, at whatever date the will was executed (*y*).

The Married Women's Property Act, 1907.

Section 1 has been repealed by the Law of Property Act, 1925 : see *infra*.

Section 2. "(1) Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this Act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

(*t*) *Paquin* v. *Beauclerk*, [1906] A. C. 148; cf. *Morel* v. *Earl of Westmoreland*, [1904] A. C. 11.

(*u*) *Studley* v. *S.*, [1913] P. 119; see (n.) "Restraint on Anticipation," *infra*.

(*x*) 28 Ch. D. 709, following *Noble* v. *Willock*, L. R. 7 H. L. 580; and see *Re Cuno*, 43 Ch. D. 12; *Re Smith*, 45 Ch. D. 632.

(*y*) *Re Wylie*, [1895] 2 Ch. 116; *Re James*, [1910] 1 Ch. 157.

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" (2) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this Act had not been passed.

" (3) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infants Settlement Act, 1855."

Section 3. " (1) Where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is by virtue of the Married Women's Property Act, 1882, made her separate property, then she alone shall, in respect of that estate, be the protector of the settlement.

" (2) This section applies to disentailing assurances and surrenders made after the thirty-first day of December, one thousand eight hundred and eighty-two, and as well before as after the commencement of this Act."

The Law of Property Act, 1925.

Section 170. " (1) A married woman is able to acquire as well from her husband as from any other person, and to hold any interest in property, real or personal, either solely or jointly with any other person (whether or not including her husband) as a trustee or personal representative, in like manner as if she were a *feme sole*; and no interest in such property shall vest or be deemed to have vested in the husband by reason only of the acquisition by his wife.

" (2) A married woman is able, without her husband, to dispose of, or to join in disposing of, any interest in real or personal property held by her solely or jointly with any other person (whether or not including her husband) as trustee or personal representative in like manner as if she were a *feme sole*."

This section applies to women married on or after January 1, 1883, and to any woman married before that date who becomes a trustee or personal representative on or after that date (sub-section 3).

By section 167 of the Law of Property Act, 1925, a disposition which by the Fines and Recoveries Act, or any other enactment, a married woman is authorised to make by deed acknowledged, is to be effectual if made with the concurrence of her husband

but without acknowledgment; and the separate examination of a married woman is not to be necessary before an order is made for payment or transfer of money or property according to her directions. The section only applies to deeds executed and orders made after the commencement of the Act.

3. Wife's Power of Disposition over her Separate Estate.

Personal Estate.—A *feme covert* can by the general law, independently of any statute, and although there is no express power of disposition given to her, dispose of personal property settled upon her for her separate use, either by acts *inter vivos*, or by *will* (*z*). A will made before 1882, by a married woman then having capacity to make a will, passes separate estate acquired under the Act of 1882, and this without re-execution (*a*).

An English woman who has married a foreigner, and therefore acquired his domicil (*b*) (the settlement being made in England, and it being provided in the settlement that it shall be construed according to English law), can dispose entirely by will of personalty settled to her separate use, although according to the law of her husband's domicil she could only do so partially (*c*).

Apart from statute, where the separate use was confined to a *life interest*, her power of disposition by deed or will would not extend beyond that estate, even though she were entitled to the reversion, as for instance if a fund belonging to a married woman were settled upon trust for her "*absolutely*" and "*during her life* for her separate use" (*d*).

Accumulations of separate estate made by a married woman during coverture pass by her will. Prior to the Married Women's Property Act, 1893, it seems that accumulations made during widowhood would not pass under a will made during the coverture (*e*).

Real Estate.—Over lands which are her separate estate, a

(*z*) *Fettiplace* v. *Gorges*, 1 V. 46; *Rich* v. *Cockell*, 9 V. 369; *Sturgis* v. *Corp*, 13 V. 190; *Noble* v. *Willock*, L. R. 7 H. L. 580; *Re Price*, 28 Ch. D. 709; *Re Cuno*, 43 Ch. D. 12; *Re Bowen*, [1892] 2 Ch. 291.

(*a*) *Re Bowen*, [1892] 2 Ch. 291; and see *Charlemont* v. *Spencer*, 11 L. R. Ir. 347.

(*b*) Westlake (7th ed.), p. 346.

(*c*) *Re Hernando*, 27 Ch. D. 284; and see *Re Mackenzie*, [1911] 1 Ch. 578, 596; Westlake (7th ed.), p. 79.

(*d*) See *Hanchett* v. *Briscoe*, 22 B. 496; *Troutbeck* v. *Boughey*, 2 Eq. 534; cf. *Re Davenport*, [1895] 1 Ch. 361.

(*e*) *Re Wilson*, 26 W. R. 848.

married woman has the same power of disposition *by deed or will* as if she were a *feme sole*, so far as relates to the equitable or beneficial interest therein (*f*). With respect to property coming to her under the Act of 1882, she will be able to dispose of both legal and equitable estate without the concurrence of her husband and without deed acknowledged (*g*), and this power of disposition is extended by the Married Women's Property Act, 1907, to trust estates, to which the provisions of the Act of 1882 had been held not to apply (*h*).

4. Liability of Corpus of Married Woman's Property when she has a Life Interest with a Power.

A. *Apart from the Married Women's Property Act*, 1882.

Where property is limited to a married woman, to her *separate use for life*, with remainder as she should, notwithstanding her coverture, by *deed or will* appoint, and *a fortiori* where there is a remainder to her *executors or administrators*, it would (independently of statute) be treated as an *absolute gift* to the sole and separate use of the married woman, and consequently be liable to her general engagements and debts (*i*). In *The London Chartered Bank, etc.* v. *Lemprière* (*k*), a widow settled on her second marriage certain property for her separate use for life, with remainder as she should by deed or will appoint, with remainder in default to her executors and administrators. This was held to be an absolute settlement for her sole and separate use, and such a form of gift, without restraint on anticipation, vests in her, in equity, the entire corpus for all purposes (*l*). In *Re Armstrong, ex p. Gilchrist* (*m*), real estate was settled by a woman before her marriage to her separate use for life, without restraint, remainder as she should by deed or will appoint *and in default to her children in fee*. She traded, became bankrupt, and the trustee in bank-

(*f*) See *Taylor* v. *Meads*, 4 De G. J. & S. 597, 603; *Baggett* v. *Meux*, 1 Ph. 627.

(*g*) *Re Drummond, etc.*, [1891] 1 Ch., at p. 524.

(*h*) *Re Harkness and Allsopp's Contract*, [1896] 2 Ch. 358, a decision distinguished in *Re Brooke and Fremlin's Contract*, [1898] 1 Ch. 647, as not being applicable to the case of a married woman who is a mortgagee and not a trustee; and see *Re West and Hardy's Contract*, [1904] 1 Ch. 145.

(*i*) See *Allen* v. *Papworth*, 1 Ves. Sen. 163; *Heatley* v. *Thomas*, 15 V. 596; and see note (*k*), *infra*.

(*k*) L. R. 4 P. C. 572, overruling *Shattock* v. *S.*, 2 Eq. 182, but see remarks of Kay, J., *Re Roper*, 39 Ch. D., at p. 489; and *Re Hastings*, 35 Ch. D. 94.

(*l*) *Ibid.*, L. R. 4 P. C., at p. 595.

(*m*) 17 Q. B. D. 167, 521.

ruptcy required her to execute her power in his favour. The Court of Appeal, overruling the Divisional Court, held, that such a power was not "property" (*n*) under the Married Women's Property Act, 1882, s. 1, sub-s. 5—(under which a married woman carrying on a trade separately from her husband is "in respect of her separate property," subject to the Bankruptcy laws)—and that she could not be compelled to exercise the power; also, that although equity has given effect to the contracts of a married woman out of property over which she has a general power of appointment, where the remainder in default is *limited to her executors and administrators*, yet it has never done this in her lifetime, or where there is a gift over in default to others (*o*).

Where, after a life interest to her separate use, a married woman has a general power of appointment by will only, and there is a gift over in default of the exercise of the power, it seems that upon the exercise of the power the fund becomes upon her death assets for the payment of her ante-nuptial debts (*p*). But where a married woman, under the old law, has a general testamentary power of appointment but no prior life interest, her exercise of the power will not make the funds assets for the payment of her debts (*q*).

Where a married woman has a life interest followed by a general power of testamentary appointment with a gift over in default, and the power is not exercised, her debts and engagements cannot prevail against the parties entitled in default of appointment (*r*).

B. *By the Married Women's Property Act*, 1882.

Section 4: "*The execution of a general power* by *will* of a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act." This provision does not apply to contracts made by a married woman during coverture, unless made after 1882 (*s*); nor to contracts made during coverture before the passing of the Married Women's Property Act, 1893, unless the married woman had, at the time of entering into the engagement, some separate estate in

(*n*) See *Re Mathieson*, [1927] 1 Ch. 283, 294, 297.
(*o*) See *Re Roper*, 39 Ch. D., at p. 490.
(*p*) *Re Parkin*, [1892] 3 Ch. 510; *Re Harvey's Estate*, 13 Ch. D. 216.
(*q*) *Re Roper*, 39 Ch. D. 482.
(*r*) *Johnson* v. *Gallagher*, 3 De G. F. & J. 502, 513; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C., at p. 592.
(*s*) *Re Roper*, 39 Ch. D. 482.

reference to which she might be deemed to have contracted (*t*). But the section applies to contracts made when the married woman was a *feme sole*, whether made before or after the Act (*u*).

5. (A) Liability of Separate Estate for a General Engagement.

Apart from the express provisions of statute, "if a married woman, having separate property, enters into a pecuniary engagement, whether by ordering goods or otherwise, which (if she were a *feme sole*) would constitute her a debtor, and in entering into such engagement she purports to contract, not for her husband, but for herself, and on the credit of her separate estate, and it was so intended by her, and so understood by the person with whom she is contracting, that constitutes an obligation for which the person with whom she contracts has the right to make her separate estate liable; and the question whether the obligation was contracted in such manner must depend upon the facts and circumstances of each particular case" (*x*), because it is now admitted that if a married woman enters into a verbal contract, expressly (or impliedly) making her separate estate liable, such contract would bind it; nor is it necessary that there should be any express reference made to the fact of there being such separate estate, for a bond or promissory note given by a married woman, without any mention of her separate estate, has long been held sufficient to make her separate estate liable.

As the "*engagement*" of a married woman differs from a contract, not in the nature of the transaction itself, but in making only the separate estate the debtor, it follows that in all that relates to the transaction itself the ordinary rules and limitations of contract apply.

As the general engagements of a *feme covert* were binding upon her separate estate, on the ground only of her intention that they should be a charge upon it, therefore, when it was not her intention to contract a personal debt, or to charge a gross sum upon her separate estate, the Court could not raise an *implied assumpsit* to charge it in opposition to her intention (*y*).

So where a married woman received from the trustee rents

(*t*) *Re Fieldwick*, [1909] 1 Ch. 1; overruling *Re Ann*, [1894] 1 Ch. 549.

(*u*) *Re Hughes*, [1898] 1 Ch. 529.

(*x*) *Per* Kindersley, V.-C., in *Mrs. Matthewman's Case*, 3 Eq. 787; and see *Johnson* v. *Gallagher*, 3 De G. F. & J. 513; *London Chartered Bank* v. *Lemprière*, L. R. 4 P. C. 590.

(*y*) *Williams* v. *Bolton*, 2 V. 138; *Jones* v. *Harris*, 9 V. 486.

of an estate to which she claimed to be entitled as her separate property, but it turned out that she was not entitled, the Court refused to give relief to the real owner against her other separate estate (*z*).

Her separate estate has been made liable in the following instances : On her bond (*a*); on her covenant (*b*); in a suit by her husband for money paid on her behalf and money lent (*c*); on bill of exchange (*d*); on her promissory note (*e*); on her contract to purchase (*f*); on an agreement to pay rent (*g*); on an agreement to take a house, and taking possession (*h*); on retainer of solicitor (*i*); for costs of suit improperly instituted against husband (*k*).

The Acts of 1882 and 1893 give a married woman a general contractual capacity to enter into any contracts effectual as against her separate estate unrestrained from anticipation (*l*). Under the Act of 1882, if she has separate estate at the date of the contract (*m*) with respect to which she could reasonably be deemed to have contracted (*n*), her contract will bind it; if she breaks her contract, any separate estate which she has since acquired, and which she has at the time when judgment is recovered against her, will be liable for her breach (*m*). Neither under the

(*z*) *Wright* v. *Chard*, 1 De G. F. & J. 567; and see *Whittaker* v. *Kershaw*, 45 Ch. D. 320.

(*a*) *Norton* v. *Turvill*, 2 P. W. 144, explained in *Re Hastings*, 35 Ch. D., at p. 99; *Hulme* v. *Tenant*, *supra*; *La Touche* v. *L.*, 3 H. & C. 576; *Heatley* v. *Thomas*, 15 V. 596.

(*b*) *Mayd* v. *Field*, 3 Ch. D. 587, commented upon, *Re Roper*, 39 Ch. D. 490; *Re Hughes*, [1898] 1 Ch. 529.

(*c*) *Butler* v. *B.*, 16 Q. B. D. 374.

(*d*) *Owen* v. *Homan*, 4 H. L. C. 997; *McHenry* v. *Davies*. 10 Eq. 88; Pollock (9th ed.), p. 737.

(*e*) *Davies* v. *Jenkins*, 6 Ch. D. 728.

(*f*) *Picard* v. *Hine*, L. R. 5 Ch. 274.

(*g*) *Master* v. *Fuller*, 4 Bro. Ch. 19.

(*h*) *Gaston* v. *Frankum*, 2 De G. & Sm. 561.

(*i*) *Murray* v. *Barlee*, 3 My. & K. 210; cf. *Callow* v. *Howle*, 1 De G. & Sm. 531; *Wright* v. *Chard*, 4 Dr. 702; *Re Pugh*, 17 Bea. 336; and see *Re Peace and Waller*, 24 Ch. D. 405.

(*k*) *M.* v. *C.*, L. R. 2 P. & D. 414; for her present liability for costs, see Married Women's Property Act, 1882, s. 1, sub-s. 2, and Married Women's Property Act, 1893, s. 2.

(*l*) Act of 1882, s. 1, sub-s. 2, and Act of 1893, s. 1; section 4 of Act of 1893 repeals sub-sections 3 and 4 of the Act of 1882; and see generally *Whittaker* v. *Kershaw*, 45 Ch. D. 320; *Hoare* v. *Niblett*, [1891] 1 Q. B. 781; *Butler* v. *B.*, 16 Q. B. D. 374; *Sweet* v. *S.*, [1895] 1 Q. B. 12; cf. *Webster* v. *W.*, [1916] 1 K. B. 714.

(*m*) *Re Shakespear*, 30 Ch. D., at p. 171; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B. 559.

(*n*) *Leak* v *Driffield*, 24 Q. B. D. 98; *Braunstein* v. *Lewis*, 65 L. T. 449.

Act of 1882, nor under the Act of 1893, does a contract create a *personal* liability in a married woman, but only a proprietary liability (*o*); the judgment is to be executed against her property, not against her person (*p*). By the Act of 1893, s. 1 (*pp*), the married woman's free separate estate at the date of judgment in an action on a contract is bound whether she has separate property at the time she enters into the contract or not. The section expressly preserves from liability any separate property which at that time or thereafter she is restrained from anticipating. To quote from a learned writer (*q*) : "The spirit of the modern authorities is, on the whole, in the direction of holding that a married woman's 'engagement' differs from an ordinary contract only in the remedy being limited to her separate property. Her creditor is in a position like that of trustees for a society, or the like, who has agreed to look only to a specified fund for payment."

(B) Married Woman's Liability for Breach of Trust, Fraud, and Tort.

Before the Act of 1882, the separate estate of a married woman could not, as a general rule, be made liable for breaches of trust or tort committed by her (*r*). But where she was an actual actor in a breach of trust affecting property subject to the trusts of an instrument under which she took a separate interest, then her separate estate under that instrument which was not restrained from anticipation might be affected and charged (*s*), and similarly it might be affected by her fraud (*t*).

Under section 18 of the Act of 1882 the married woman trustee can sue and be sued as a *feme sole;* by section 24 the word "contract" includes "the acceptance of any trust or of the office of executrix or administratrix," and the provisions of the Act as to liabilities of married women are extended to liabilities arising

(*o*) *Scott* v. *Morley*, 20 Q. B. D., at p. 128; cf. *Re Turnbull*, [1900] 1 Ch. 180.

(*p*) *Holtby* v. *Hodgson*, 24 Q. B. D., at p. 105; *Re Beauchamp*, [1904] 1 K. B. 572.

(*pp*) See note (*m*), p. 578.

(*q*) Pollock, Contracts (9th ed.), p. 739.

(*r*) *Wainford* v. *Heyl*, 20 Eq. 321.

(*s*) *Sawyer* v. *S.*, 28 Ch. D. 595; *Crosby* v. *Church*, 3 B. 485; *Pemberton* v. *McGill*, 1 Dr. & Sm. 266; *Clive* v. *Carew*, 1 J. & H. 199; *Mara* v. *Manning*, 2 Jo. & Lat. 311; as to the liability of arrears of restrained separate estate, see *Pemberton* v. *McGill*, *supra; Hood-Barrs* v. *Heriot*, [1896] A. C., at p. 180; and see Trustee Act, 1925, *infra*.

(*t*) See *Wainford* v. *Heyl*, *supra; Sharpe* v. *Foy*, L. R. 4 Ch. 35; *Re Lush*, L. R. 4 Ch. 591.

by reason of any breach of trust or devastavit (*u*). The married woman may now be sued apart from her husband for any tort committed by her (section 1, sub-section 2 of the Act of 1882), and her husband cannot sue for any tort committed against her separate estate (*x*). The Act has not, it seems, removed the husband's common law liability for torts committed by his wife; and a plaintiff may sue the husband and wife jointly, or the wife alone, for wrongs committed by her after the marriage (*y*). But a husband is not liable for his wife's tort committed during the marriage, if the tort is directly connected with a contract entered into by the wife and was the means of inducing it, so as to be part of the same transaction (*z*). The husband can only be sued in the case of a bare tort unconnected with contract. In a recent case (*a*) a difference of opinion was expressed by members of the highest tribunal. The majority (Viscount Finlay and Lords Atkinson and Sumner) held that notwithstanding the Act of 1882, a husband is still liable to be sued with his wife for a tort committed by her during coverture, unless the tort is directly connected with and is the means of enforcing a contract made with her. In the opinion of Viscount Cave and the Earl of Birkenhead, on the other hand, the Act of 1882 has abrogated the common law rule that the husband is liable for his wife's torts, and *Seroka* v. *Kattenburg* (*b*) was wrongly decided.

6. Form of Judgment against Married Woman.

The form of judgment under the Act of 1882 was settled in *Scott* v. *Morley* (*c*), as follows:—Adjudged that the plaintiff recover against the defendant (a married woman) £ and £ costs to be taxed, "such sum and costs to be payable out

(*u*) See *Re Turnbull*, [1900] 1 Ch. 180.

(*x*) *Ruston* v. *Sherras*, 44 Sol. Jo. 11.

(*y*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585; *Cuenod* v. *Leslie*, [1909] 1 K. B. 880; *Re Beauchamp*, [1904] 1 K. B. 572; but see *Edwards* v. *Porter*, [1925] A. C., at pp. 6 and 14.

(*z*) *Earle* v. *Kingscote*, [1900] 2 Ch. 585.

(*a*) *Edwards* v. *Porter*, [1925] A. C. 1.

(*b*) 17 Q. B. D. 177.

(*c*) 20 Q. B. D. 120. In 1896 this form of judgment, which had served as a pattern, was abbreviated by direction of the Court of Appeal with reference to an unreported Chancery case (*Savage* v. *S.*: see L. Q. R., July, 1905, p. 242) as follows:—Adjudged that the plaintiff recover against the defendant (married woman) £ and costs, such sum and costs to be payable out of her separate property and not otherwise. The *Scott* v. *Morley* form is, however, adhered to. For forms of judgment against a married woman, see Annual Practice (1928), pp. 2059, 2060.

of her separate property and not otherwise; and let execution hereon be limited to the separate property of the said . . . not subject to any restriction against anticipation unless by reason of section 19 of the Married Women's Property Act, 1882, the property shall be liable to such execution notwithstanding such restraint " (*d*). The judgment against the married woman on a contract under the Act is a judgment against her, but enforceable only against her separate estate (*e*). It is important for a plaintiff who recovers judgment against a married woman to see that it is in the form as laid down in *Scott* v. *Morley*; if the judgment is drawn up as a personal judgment, as it would be if the defendant had been a *feme sole*, it cannot afterwards be corrected under the stop order (*f*).

Under a judgment such as the above, recovered in an action brought strictly under sub-section 2 of section 1 of this Act, a married woman cannot be committed on a judgment summons under the Debtors Act, 1869, s. 5 (*g*). But this does not apply to judgments which may be recovered against a woman at common law, for the Act does not alter the legal liability of a married woman (*h*). In *Re Turnbull* (*i*) it was held that where a married woman administratrix has money in her hands belonging to the estate, she may be ordered to pay it into Court, and she will be liable to attachment if she does not do so. But, *semble*, if the object of the order had been not for the better securing of the fund, but to compel the married woman to make good a loss occasioned by her devastavit, the order should have been made in the form prescribed in *Scott* v. *Morley*, and she would not have been liable to attachment for non-compliance with it.

A judgment debt against a married woman, enforceable only against property to her separate use which she is not restrained from anticipating, is a " judgment " within the meaning of Order 45, r. 1, R. S. C., enabling the judgment creditor to institute garnishee proceedings for the purpose of attaching a debt owing or accruing to such married woman (*k*). The judgment may

(*d*) *Jay* v. *Robinson*, 25 Q. B. D. 467; and for form of judgment on ante-nuptial debt of a married woman, *Birmingham Excelsior, etc.* v. *Lane*, [1904] 1 K. B. 35; and see *infra*, p. 602.

(*e*) *Holtby* v. *Hodgson*, 24 Q. B. D., *per* Lindley, L.J., at p. 108.

(*f*) *Oxley* v. *Link*, [1914] 2 K. B. 734.

(*g*) *Scott* v. *Morley*, 20 Q. B. D. 120.

(*h*) See 20 Q. B. D., at pp. 125, 127.

(*i*) [1900] 1 Ch. 180.

(*k*) *Holtby* v. *Hodgson*, 24 Q. B. D. 103; An. Pr. (1927), p. 800.

be enforced against her separate estate not subject to restraint on anticipation by the appointment of a receiver (*l*). Judgment cannot be enforced against property subject to a restraint on anticipation, nor against arrears of income of property subject to such restraint which accrue due after the date of the judgment (*m*), but it is enforceable against arrears accrued due at or before the date of the judgment, notwithstanding that such arrears may not have actually reached her hands (*n*). The removal of the restraint by the death of the husband subsequent to the judgment does not make the property subject thereto liable to process (*o*). The words in the proviso to section 1 of the Act of 1893 prevent execution against property which at the date when the contract sued upon was entered into was subject to restraint upon anticipation, although the judgment be obtained after the coverture has ceased through death or divorce (*p*).

7. Of Gifts by the Wife to the Husband of the Income or Corpus of her Separate Estate.

Where property is settled to the separate use of a married woman without any restraint upon anticipation, she can deal with the income or corpus as she pleases, and may make a gift thereof to her husband or anyone else (*q*). There is no real difference between capital and income except in degree. In every case where money of the wife comes to the husband, whether from capital or income, the question is whether a gift was intended or not; and to establish the gift and so prevent the presumption of a resulting trust, clear evidence that the wife gave or assented to the payment or transfer to her husband is necessary (*r*). It seems, however, that where the husband and wife are living in amity a gift of the income of a fund may sometimes be inferred, though a gift of the capital would not be inferred (*s*). Where, however, there is no evidence of the wife's having assented to or acquiesced in the receipt of her income

(*l*) *Re Peace and Waller*, 24 Ch. D. 407; *Perks* v. *Mylrea*, [1884] W. N. 64; *Hill* v. *Roberts*, [1893] 2 Q. B. 85.

(*m*) *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; *Bolitho* v. *Gidley*, [1905] A. C. 99.

(*n*) *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.

(*o*) *Pelton* v. *Harrison*, [1891] 2 Q. B. 422.

(*p*) *Barnett* v. *Howard*, [1900] 2 Q. B. 784; *Brown* v. *Dimbleby*, [1904] 1 K. B. 28; *Softlaw* v. *Welch*, [1899] 2 Q. B. 419; *Studley* v. *S.*, [1913] P. 128.

(*q*) *Caton* v. *Rideout*, 1 Mac. & G. 599, 601; *Dixon* v. *D.*, 9 Ch. D. 587, 590; *Re Dixon*, [1900] 2 Ch. 561.

(*r*) *Mercier* v. *M.*, [1903] 2 Ch. 98, 100.

(*s*) See, *e.g.*, *Re Flamank*, 40 Ch. D. 461; Lush (3rd ed.), p. 225.

by her husband she will be entitled to reimbursement out of his estate (*t*), and without knowledge assent must not be presumed (*u*).

Income.—"There is no doctrine, I suppose, better settled than this, that when husband and wife are living together, the wife's separate income received by the husband with her permission, to be inferred merely from conduct and circumstances cannot be recalled: *Caton* v. *Rideout*," *per* Lord Macnaghten in *Hood-Barrs* v. *Heriot* (*x*). Where, however, the wife is of unsound mind and therefore cannot consent, the rule has no application (*y*).

Where a married woman living with her husband in Scotland was entitled for her separate use to the income of a fund, which stood in the names of trustees of whom her husband was one, and payments of income were at first lodged in a bank to the credit of the wife's separate account, and then to an account in the names of husband and wife, but for many years before the husband's death and when he had become sole trustee, the income was paid into his own banking account and mixed with his own funds, the House of Lords inferred from these circumstances a complete gift (*z*). "The rule in equity is clear from the earliest times (and the cases go back to the time of Lord Macclesfield) that when husband and wife have lived together, the wife cannot charge her husband, or her husband's estate as her debtor, for arrears of her separate income which she has permitted him to receive" (*a*). To displace the rule it is not sufficient to show that the separate income has accumulated in the husband's hands and remains unspent (*b*), or that the husband is himself a trustee of the income (*c*), or that the wife is restrained from anticipation (*d*).

The rule that the arrears of the wife's separate estate cannot be recovered as against the husband, being founded on the presumption that it has been applied to the maintenance of the wife or to the general purposes of the family, with the assent of the wife, does not,

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(*t*) *Parker* v. *Brooke*, 9 V. 583; *Moore* v. *M.*, 1 Atk. 272; *Dixon* v. *D.*, 9 Ch. D. 587; *Wassell* v. *Leggatt*, [1896] 1 Ch. 554.

(*u*) *Dixon* v. *D.*, 9 Ch. D., at pp. 592, 593.

(*x*) [1896] A. C., at p. 184.

(*y*) Lewin (12th ed.), p. 1001.

(*z*) *Edward* v. *Cheyne*, 13 A. C. 384; *Rowley* v. *Unwin*, *infra*; cf. *Mercier* v. *M.*, *supra*.

(*a*) 13 A. C., at p. 398, *per* Lord Macnaghten.

(*b*) *Beresford* v. *Armagh*, 13 Si. 643.

(*c*) *Caton* v. *Rideout*, *supra*; *Re Dixon*, *supra*.

(*d*) *Rowley* v. *Unwin*, 2 Kay & J. 138; *Edwards* v. *Cheyne*, 13 A. C., at p. 398; *Howard* v. *Digby*, 2 Cl. & Fin. 643 (pin-money), and the comments thereon, Sugden, Property, 162; *Payne* v. *Little*, 26 B. 1.

it seems, apply where there is a receiver over the property liable to pay it, nor has it any application against a purchaser for valuable consideration (*e*).

In *Re Dixon* (*f*), the husband of a woman entitled to a life interest restrained from anticipation in a fund under their marriage settlement, borrowed in 1852 a sum of money from the trustees on the security of his bond in a penal sum conditioned for repayment to the trustees of the loan with interest thereon at 4 per cent. The husband and wife lived in amity for more than twenty years after that date; on her death in 1876 the husband became entitled to the income of the fund for his life. On his death in 1896, the question arose whether recovery of the sum borrowed by him was barred by the Statute of Limitations, no payment of interest on the loan having been in fact made by the husband. It was held that as the husband and wife were living in amity, the principle of *Caton* v. *Rideout*, *supra*, applied; that she must be deemed to have assented in her husband's retaining the interest as it fell due, it being unnecessary for the husband to pay the interest to the wife, and the wife to pay it back to the husband; and the statute accordingly did not apply (*g*).

Where there is no gift of the income, and land is purchased therewith in the name of the husband, there is a resulting trust for the wife which may be established by parol evidence after her death (*h*).

Corpus.—With regard to the corpus of her separate estate, a married woman may give her husband the same interest therein as she can to any other person (*i*), chattels settled to her separate use passing by manual delivery (*k*); and if she authorises money to which she is entitled to her separate use to be paid to him, she cannot recall it (*l*). But in the case of corpus, there is no presumption in favour of the husband who has received it, although the parties are amicably living together. The onus lies on the husband of proving that a gift was intended; otherwise he will be a trustee for the wife (*m*). In *Rich* v. *Cockell* (*n*) a trustee

(*e*) *Foss* v. *F.*, 15 Ir. Ch. R. 215; followed, *Tuffnell* v. *O'Donoghue*, [1897] Ir. R. 360, 368.

(*f*) [1900] 2 Ch. 561; and see *Amos* v. *Smith*, 1 H. & C. 238.

(*g*) Cf. *Re Eyre Williams*, [1923] 2 Ch. 533, 540.

(*h*) *Mercier* v. *M.*, [1903] 2 Ch. 98.

(*i*) *Gardner* v. *G.*, 1 Giff. 126.

(*k*) *Farington* v. *Parker*, 4 Eq. 116.

(*l*) *Caton* v. *Rideout*, 1 Mac. & G. 599, 601; and see *Re Dixon*, [1900] 2 Ch. 561.

(*m*) Lewin (12th ed.), p. 1002.

(*n*) 9 V. 369.

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of stock bequeathed to the separate use of a married woman, transferred it to her husband. The husband failing to prove clearly that his wife intended to give him the stock, he was held by Lord Eldon to be a trustee thereof for her. "As at the time the legacy was given," said his Lordship, "it was for the separate use of the wife, and it continued so until transferred to the husband, that transfer could not destroy the separate trust, unless clear evidence is produced by the husband that it was intended, with her assent, to destroy it. If the evidence is short of that, as it is perfectly settled that a husband may in this Court be a trustee for the separate use of his wife, he would be precisely in the same situation as to the beneficial interest as the person who made the transfer. Therefore he is a trustee" (*o*).

A wife may by her acts, without any express gift, show that it was her intention that her husband should have her separate property without liability to account. Where, for instance, the husband has employed it with the knowledge and consent of his wife, in his business and for the expenditure of his family, a gift thereof from the wife will, in absence of an agreement to the contrary, be presumed (*p*). When the husband has received the wife's property otherwise than as a gift, she can prove as a creditor against his estate in an administration suit (*q*).

8. Loans by Wife to Husband and Exoneration of Wife's Separate Estate.

At common law no contract could be made between husband and wife (*r*); in equity the wife could contract with her husband in respect of her separate estate and, suing by her next friend, enforce contracts so made (*s*). It is quite clear that if money, part of her separate estate, be handed over by her to her husband, on a contract of loan, the wife may sue her husband upon that contract (*t*). Under the Married Women's Property Act, 1882,

(*o*) And see *Re Flamank*, 40 Ch. D. 461; *Re Blake*, 60 L. T. 663. See *Wassell* v. *Leggatt*, *supra*; *Mercier* v. *M.*, [1903] 2 Ch. 98; *M'Ardle* v. *Gaughran*, [1903] 1 Ir. R. 106.

(*p*) *Gardner* v. *G.*, 1 Giff. 126; and see *Paget* v. *P.*, [1898] 1 Ch. 470; cf. *Hall* v. *H.*, [1911] 1 Ch. 487.

(*q*) *Woodward* v. *W.*, 3 De G. J. & S. 672; and see *Re Blake*, *supra*.

(*r*) Lush (3rd ed.), p. 442.

(*s*) See *per* Cotton, L.J., *Butler* v. *B.*, 16 Q. B. D., at p. 378.

(*t*) *Per* Lord Westbury, *Woodward* v. *W.*, 3 De G. J. & S., at p. 674.

the wife has in respect of her separate estate full capacity to enter into contracts with her husband (*u*).

Despite the wife's common law incapacity to contract with her husband (*x*), it was from an early date recognised in equity (*y*) that where the wife's freehold estates, though not held to her separate use, had been mortgaged or charged to raise money which had been applied in the payment of her husband's debts, she or those entitled under her could require the husband or his real or personal representatives to exonerate her estate from the mortgage or charge. The principle so established was also applied to mortgages and charges of her separate estate. "The authorities bearing upon the subject, beginning with *Huntington* v. *H.* (*z*) and coming down to *Hudson* v. *Carmichael* (*a*), show that if a married woman charges her property with money for the purpose of paying her husband's debts, and the money raised by her is so applied, she is *prima facie* regarded in equity, and as between herself and him, as lending him and not giving him the money raised on her property and as entitled to have her property exonerated by him from the charge she has created" (*b*).

Whether the wife was to be regarded as a creditor standing in the place of the creditor whose claim had been discharged with her moneys or as a surety who had discharged his principal's liability was doubtful (*c*); but it appears that her rights may be regarded as arising from implied contract, and all the circumstances surrounding the transaction must be considered (*d*).

The presumption only arises where property actually vested in the wife is mortgaged or charged, and so the doctrine does not apply where she with her husband mortgage under a power overriding her interest (*e*). Her equity was always held to avail against volunteers claiming through her husband (*f*).

By the *Bankruptcy Act, 1914*, section 3 of the Married Women's Property Act, 1882, is repealed, and in its place the following provision is enacted :—

(*u*) See *Butler* v. *B.*, 14 Q. B. D. 831, affirmed 16 Q. B. D. 374.
(*x*) See Lord Westbury, *Scholefield* v. *Lockwood*, 4 De G. J. & S., at p. 27.
(*y*) *Huntington* v. *H.*, 2 Vern. 437.
(*z*) *Supra.* (*a*) Kay, 613.
(*b*) *Paget* v. *P.*, [1898] 1 Ch. 470, 474; and see *Hall* v. *H.*, [1911] 1 Ch. 487.
(*c*) See, *e.g.*, *Scholefield* v. *Lockwood*, *supra.*
(*d*) *Paget* v. *P.*, *supra*, citing *Clinton* v. *Hooper*, 1 V. 173; 3 Bro. C. C. 201. But see *Hall* v. *H.*, *supra.*
(*e*) *Scholefield* v. *Lockwood*, *supra.*
(*f*) *Huntington* v. *H.*, *supra*; *Tate* v. *Austen*, 1 P. W. 264.

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Section 36. "(1) Where a married woman has been adjudged bankrupt, her husband shall not be entitled to claim any dividend as a creditor in respect of any money or other estate lent or entrusted by him to his wife for the purposes of her trade or business until all claims of the other creditors of his wife for valuable consideration in money or money's worth have been satisfied.

"(2) Where the husband of a married woman has been adjudged bankrupt, any money or other estate of such woman lent or entrusted by her to her husband for the purpose of any trade or business carried on by him or otherwise, shall be treated as assets of his estate, and the wife shall not be entitled to claim any dividend as a creditor in respect of any such money or other estate until all claims of the other creditors of her husband for valuable consideration in money or money's worth have been satisfied."

Notwithstanding the words "or otherwise" in sub-section 2, it appears that the section has no application where the money is lent for purposes unconnected with the husband's business (*g*), nor where the wife of a trader, being surety for advances made to him by a bank for purposes of his business, pays off the bank and so becomes a creditor of her husband (*h*).

Where a married woman lent £1,000 to her husband for the purposes of his business, and subsequently took from him a bond in the penal sum of £2,000, the condition of the bond being that the wife should be paid an annuity of £40 during her life and that if such annuity were paid the annuity should be void, and the husband later became bankrupt, it was held that a claim upon the bond was not a claim for money lent within the meaning of the section (*i*). It appears that where a wife lends money to her husband, who afterwards becomes bankrupt, the onus of showing that the loan was unconnected with the trade or business of the husband does not lie on the wife proving for the loan in her husband's bankruptcy (*k*); although a wife cannot prove against her deceased husband's estate, if insolvent, in respect of a loan made for the purposes of his business, in competition with his

(*g*) *Re Clark*, [1898] 2 Q. B. 330, approving *Re Tidswell*, 56 L. J. Q. B. 548, which were decided on the same words in section 3 of the Married Women's Property Act, 1882.

(*h*) *Re Cronmire*, [1901] 1 K. B. 480.

(*i*) *Re Slade*, [1921] 1 Ch. 160.

(*k*) *Re Cronmire*, *supra*, at p. 485.

creditors for value, nevertheless, if she is her husband's executrix, she can retain the amount of the loan out of assets in her hands (*l*).

9. Wife's Ante-nuptial Debts and Liabilities.

"At common law the husband was liable for his wife's ante-nuptial debts to the whole extent of his property, whether he knew of their existence or not, and whether he obtained any property from his wife or not, but he could not be sued alone for such debts if his wife were alive, and he could not be sued at all for them after her death" (*m*). At common law as regarded a contract made by a woman before marriage, but which was not sued upon till after marriage, she and her husband were sued together, and if it was proved that the contract on which the action was brought had been made by the wife before marriage, the judgment went against both husband and wife, and the execution followed the judgment. At common law a married woman was liable to be taken under a *capias ad satisfaciendum* upon a judgment recovered after her marriage against her and her husband, in respect of her contract made before marriage (*n*), and the Act of 1882 does not alter the legal liability of a woman on ante-nuptial contracts (*o*), and where she was liable to be taken in execution she can now be summoned under the Debtors Act, 1869, s. 5, which is a substitute (*p*) for the old process of *capias* (*q*). If no action were brought during the coverture and the wife survived, she remained just as liable for the debt as she was before marriage (*r*). But if an action were brought and judgment recovered against the husband and wife during the coverture, and the husband became bankrupt and obtained his discharge, the liability of the husband and the wife for the wife's debt was gone *at law* (*s*), but the

(*l*) *Re Ambler*, [1905] 1 Ch. 697; *Re Leng*, [1895] 1 Ch. 652.

(*m*) *Per* Lindley, L.J., *Beck* v. *Pierce*, 23 Q. B. D. 320; cited *Re Parkin*, [1892] 3 Ch. 519; and see *Adair* v. *Shaw*, 1 Sch. & L. 263; *Chubb* v. *Stretch*, 9 Eq., at p. 559; *Heard* v. *Stamford*, 3 P. W. 409; *Bell* v. *Stocker*, 10 Q. B. D., at p. 130.

(*n*) See judgment of Esher, M.R., in *Scott* v. *Morley*, 20 Q. B. D., at p. 124.

(*o*) *Robinson King, etc.* v. *Lynes*, [1894] 2 Q. B. 577.

(*p*) See judgment of Bowen, L.J., in *Scott* v. *Morley*, *supra*, pp. 127 *et seq.*

(*q*) See *Beck* v. *Pierce*, 23 Q. B. D., at p. 320; *Sparkes* v. *Bell*, 8 B. & C. 1; *Evans* v. *Chester*, 2 M. & W. 847; *Larkin* v. *Marshall*, 4 Exch. 806; *Edwards* v. *Martyn*, 17 Q. B. 693, 700; *Ivens* v. *Butler*, 26 L. J. Q. B. 145; *Nagle* v. *O'Donnell*, Ir. R. 7 C. L. 79; An. Pr. (1928), p. 2061.

(*r*) *Chubb* v. *Stretch*, *supra*.

(*s*) *Lockwood* v. *Salter*, 5 B. & Ad. 303; *Miles* v. *Williams*, 1 P. W. 249, 257.

wife's separate estate still remained liable *in equity* to satisfy her debts (*t*). And her husband, as her administrator, was subject to all her ante-nuptial liabilities to the extent of her property in his hands in that capacity (*u*). Since the Married Women's Property Act, 1882, however, a judgment obtained against a married woman in respect of an ante-nuptial debt cannot be enforced against property she is restrained from anticipating, unless the restraint was imposed by herself on her own property (*x*).

By the Married Women's Property Act, 1870, a husband was not to be liable (in the case of a marriage after the Act) for the debts of his wife contracted before marriage, but the wife was to be liable, and any property belonging to her for her separate use was to be liable to satisfy such debts as if she had continued unmarried. The wide terms of this enactment made it extend to property settled to the separate use of a married woman, *without power of anticipation* (*y*).

The amending Act of 1874, s. 1, repealed (in the case of marriages after July 30, 1874) so much of the Act of 1870 as enacted that a husband should not be liable for his wife's ante-nuptial debts. But in any action brought for damages for a tort committed by the wife before marriage, or for breach of any contract made by the wife before marriage, the husband was to be liable to the extent of the assets therein mentioned, being (in effect) property obtained by him through his wife (section 2).

By the Married Women's Property Act, 1882, which repeals, with the usual saving, the Acts of 1870 and 1874, it is enacted—

Section 13. " A woman after her marriage shall *continue to be liable in respect and to the extent of her separate property for all debts* contracted, and *all contracts* entered into *or wrongs* committed by her *before her marriage*, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the Acts relating to joint-stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums

(*t*) *Chubb* v. *Stretch*, 9 Eq. 555; Seton (7th ed.), p. 863.

(*u*) *Adair* v. *Shaw*, 1 Sch. & L. 243, 261.

(*x*) *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35. Cf. *Rothschild* v. *Fisher*, [1920] 2 K. B. 243.

(*y*) *Sanger* v. *S.*, 11 Eq. 470; *Axford* v. *Reid*, 22 Q. B. D. 548; and see *Birmingham Society* v. *Lane*, *supra*.

recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and *as between her and her husband, unless* there be any contract between them to the contrary, *her separate property shall be deemed to be primarily liable* for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this Act shall operate to increase or diminish the liability of any woman married before the commencement of this Act, for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this Act, and to which she would not have been entitled for her separate use under the Acts hereby repealed or otherwise, if this Act had not passed."

This section is wider than section 1, sub-section 2 (*supra*, p. 566), and under it a personal judgment can be made against a married woman and her separate property taken in execution (*z*). In *Jay* v. *Robinson* (*a*), judgment was recovered substantially in the form in *Scott* v. *Morley*, *supra*, against a married woman for a debt contracted during her marriage. She subsequently obtained a decree absolute for a dissolution, and married again, and thereupon settled property belonging to her, to her separate use without power of anticipation: *Held*, that the debt was contracted "before her marriage," within this section and section 19 of the same Act, and that the restriction on anticipation was of no validity, and a receiver was appointed, and an injunction granted restraining her from dealing with her separate estate. The word "debt" in both these sections comprehends both common law debts contracted by a married woman when single, and debts contracted in respect of her separate estate during a previous marriage (*b*), although there may be no personal liability under the Debtors Act. But a judgment against a married woman in respect of a debt contracted by her before marriage cannot be enforced by way of equitable execution against her separate property subject to a restriction against anticipation where the restriction is not contained in a settlement, or agreement for a settlement, of her own property made or entered into by herself (*c*). A husband cannot maintain any action against his wife for money lent to her, or for money

(*z*) *Robinson, King & Co.* v. *Lynes*, [1894] 2 Q. B. 577; 38 Sol. Jo. 666.
(*a*) 25 Q. B. D. 467.
(*b*) *Per* Fry, L.J., *ibid.*, p. 474; cf. *Rothschild* v. *Fisher*, [1920] 2 K. B. 243.
(*c*) *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35.

paid to her *before* their marriage at her request, *secus*, for money, etc., lent or paid *after* their marriage (*d*).

Section 14. " A husband shall be liable for the *debts* of his wife contracted and for all *contracts* entered into and *wrongs* committed by her, *before marriage*, including any *liabilities* to which she may be so subject under the Acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever, belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment may have been *bona fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid, but he shall not be liable for the same any further or otherwise; and any Court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property : Provided always, that nothing in this Act contained shall operate to increase or diminish the liability of any husband *married before* the commencement of this Act for or in respect of any such debt or other liability of his wife as aforesaid."

As to her liabilities to joint-stock companies, the Companies (Consolidation) Act, 1908, s. 128, enacts that : " (1) The husband of a female contributory married before the date of the commencement of the Married Women's Property Act, 1882 . . . shall during the continuance of the marriage be liable as respects any liability attaching to any shares acquired by her before that date to contribute to the assets of the company the same sum as she would have been liable to contribute if she had not married, and he shall be a contributory accordingly. (2) Subject as aforesaid nothing in this Act shall affect the provisions of the Married Women's Property Act, 1882." Before the Act of 1882 a married woman could become a shareholder in her own right in respect of her separate estate and could be put on the list of contributories (*e*), but the husband could likewise be made a contributory unless the company had accepted the exclusive liability of the wife (*f*). Where a married

(*d*) *Butler* v. *B.*, 14 Q. B. D. 831; 16 Q. B. D. 374. See also *Hallett* v. *Hastings*, 35 Ch. D. 94; *Beck* v. *Pierce*, 23 Q. B. D. 316.

(*e*) *Mrs. Matthewman's Case*, 3 Eq. 781.

(*f*) *Luard's Case*, 1 De G. F. & J. 533; *London, Bombay, etc., Bank*, 18 Ch. D. 581.

woman acquires shares after the Act of 1882, her separate estate is alone liable; where she had acquired the shares before marriage, her husband is liable to the extent mentioned in section 14, *supra* (*g*).

The protection given to the husband by sections 14 and 15 does not exempt him from liability for wrongs done by his wife *after* marriage, and the plaintiff may, it seems, sue the wife for such wrongs alone or with her husband (*h*). But upon divorce or judicial separation, the husband becomes free from liability for his wife's torts, although the torts may have been committed before such divorce or judicial separation took place (*i*). In *Beck* v. *Pierce* (*k*) a solicitor sued a married woman for costs incurred before marriage, and recovered judgment, which, as she had no separate estate, remained unsatisfied. An action was then brought against the husband, who had acquired from her property exceeding in value the amount claimed. *Held*, that since the Act he can be sued alone, the judgment against the wife being no bar to the action, since the liability of the husband and wife was not joint and the rule in *King* v. *Hoare* (*l*) and *Kendall* v. *Hamilton* (*m*) had consequently no application.

By section 15, a husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to

(*g*) Buckley on Companies (10th ed.), pp. 69, 309, 544.

(*h*) *Seroka* v. *Kattenburg*, 17 Q. B. D. 177; *Earle* v. *Kingscote*, [1900] 2 Ch. 585. But see the judgments of Earl Birkenhead and Viscount Cave in *Edwards* v. *Porter*, [1925] A. C. 1.

(*i*) *Cuenod* v. *Leslie*, [1909] 1 K. B. 880.

(*k*) 23 Q. B. D. 316.

(*l*) 13 M. & W. 494.

(*m*) 4 A. C. 504.

the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only (*n*).

By section 16, " a wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Act, shall in like manner be liable to criminal proceedings by her husband " (*o*).

Questions, moreover, between husband and wife as to property are to be decided in a summary way (section 17). If there is no action pending, the application will be by originating summons under Order 54, r. 4F (9) (*p*). But section 17 does not take away a wife's right to bring an action against her husband to recover her property detained by him (*q*).

10. Liability and Devolution of Separate Estate after Death.

Probate.—The present practice of the Probate Court is not to grant probate of the will of a married woman to the executors in respect of such personal estate as she had power to dispose of by will, and to grant letters of administration " *cæterorum* " to the husband, which was the old practice, but to grant to the executors probate in general terms, and not to grant any administration to the husband. So, without entering into the question whether there was property which she could not dispose of, and which would go to the husband, it grants general probate (*r*).

If her executors have died in her lifetime, administration *cum testamento annexo* will be granted to the nominees of the residuary legatees and not to her husband (*s*).

On the death of a married woman before the Act of 1882 the quality of separate property ceased as to property of which she had not disposed. The separate estate ceasing to exist (save in so far as was necessary to satisfy the claims of creditors against

(*n*) See *Beck* v. *Pierce*, *supra*; *Robinson*, *King & Co.* v. *Lynes*, [1894] 2 K. B. 577; *Birmingham Excelsior Money Society* v. *Lane*, [1904] 1 K. B. 35.

(*o*) See Married Women's Property Act, 1884, s. 1, as to evidence.

(*p*) See D. C. F. (6th ed.), p. 1180, F. 2198.

(*q*) *Larner* v. *L.*, [1905] 2 K. B. 539; *Healey* v. *H.*, [1915] 1 K. B. 938.

(*r*) *In the Goods of Price*, 12 P. D. 137; Williams, Exors. (11th ed.), pp. 45, 46 and 297.

(*s*) *In the Goods of Pine*, L. R. 1 P. & D. 388; and see *In the Goods of Fraser*, L. R. 2 P. & D. 183.

it), the husband became entitled, *jure mariti*, to his common law rights in respect of the same (*t*).

Choses in action, settled to the separate use of a married woman, on her death belonged to her husband on taking out administration to her (*u*), subject to her ante-nuptial liabilities and debts (*x*).

The principles governing the devolution of separate estate before the Married Women's Property Act, 1882, have been applied to the devolution of separate estate under that Act.

By section 23 it is provided that, "For the purposes of this Act, the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living." A husband, therefore, takes property which belonged to his wife as her separate estate, and which she has not disposed of, "*jure mariti*," and becomes by this section her legal personal representative, and is subject to her liabilities, etc., to the extent of such estate (*y*). A direction in her will that her debts shall be paid makes all the property of which she could dispose, including arrears of an annuity subject to restraint on anticipation, assets for payment of all liabilities of her separate estate, including damages for breach of covenant by her personal representatives (*z*); and *quære* whether the same result would not have followed without any direction to pay debts (*a*).

Real Estate.—There is no indication in the Act of 1882 of any intention to exclude a husband's rights in his wife's realty, any more than in her personalty, in the event of her intestacy (*b*). Therefore, in cases not governed by the Administration of Estates Act, 1925, the undisposed of real estate of a married woman settled to her separate use, of which she is *seised in fee*, descends to her heir subject to her husband's right as tenant by the curtesy (*c*); and an estate tail of the wife, subject also to the husband's tenancy by the curtesy, will descend to the heir in tail (*d*).

(*t*) *Molony* v. *Kennedy*, 10 Sim. 254; *Cooper* v. *Macdonald*, 7 Ch. D. 288, 296; *Re Bellamy*, 25 Ch. D. 620; Williams, Exors. (11th ed.), p. 529, n. (*y*).

(*u*) *Proudley* v. *Fielder*, 2 My. & K. 57; *Musters* v. *Wright*, 2 De G. & Sm. 777.

(*x*) See *Humphrey* v. *Bullen*, 1 Atk. 458; and *Re Lambert*, 39 Ch. D. 626, 631.

(*y*) *Surman* v. *Wharton*, [1891] 1 Q. B. 491; *Re M'Myn*, 33 Ch. D. 575; *Smart* v. *Tranter*, 43 Ch. D. 587. (*z*) *Sprange* v. *Lee*, [1908] 1 Ch. 424.

(*a*) *Ibid.*, *per* Neville, J., at p. 432.

(*b*) *Hope* v. *H.*, [1892] 2 Ch. 336; *Re Lambert*, 39 Ch. D. 626; cf. *Re Mackenzie*, [1911] 1 Ch. 578.

(*c*) *Hope* v. *Hope*, *supra*.

(*d*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

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With regard to the real and personal estate of any person dying after December 31, 1925, all the then existing rules of descent to the heir, and also curtesy, dower, and escheat are abolished (*e*). Real and personal estate are placed for the purposes of devolution, upon the same footing (excepting in respect of personal chattels, as defined by the Act) and the husband and wife are given equal rights to the property of either of them who may die intestate leaving the other surviving. The surviving husband or wife takes the personal chattels of his or her deceased spouse absolutely; and the rest of the estate is charged in his or her favour with payment of £1,000 free of death duties and costs. The residue of the estate goes—as to one-half if there are issue, or the whole if there are no issue—to the surviving husband or wife for life.

11. Savings and Arrears of Separate Estate.

In equity savings of a married woman arising from the income of property settled to her separate use are held (apart from statute) to be *prima facie* her separate property, and she has the same power over them as over property settled to her separate use (*f*). And the savings arising from her separate property were held liable for her contracts in the same manner as property settled to her separate use (*g*).

If a married woman lays out the savings of goods settled to her separate use in the purchase of property, or in investments in lands or houses, such property will *prima facie* belong to her to her separate use (*h*). But savings of the wife out of money given to her by her husband for *household purposes, dress, or the like*, and applied by her in making investments in her own name, will belong to her husband (*i*).

Where the judgment against a married woman is in the form given *supra*, p. 581, if she is restrained from anticipation, such restraint does not apply to income accrued due *at or before* the

(*e*) Administration of Estates Act, 1925, s. 45.

(*f*) *Fettiplace* v. *Gorges*, 1 V. 46; *Cecil* v. *Juxon*, 1 Atk. 278; *Muggeridge* v. *Stanton*, 1 De G. F. & J. 107; *Askew* v. *Rooth*, 17 Eq. 426; *Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487.

(*g*) *Butler* v. *Cumpston*, 7 Eq. 16; and see the Married Women's Property Act, 1893, s. 1 (c), *supra*.

(*h*) *Fitzgibbon* v. *Pike*, 6 L. R. Ir. 487; *Steward* v. *Blakeway*, 6 Eq. 479. Cf. *Weldon* v. *De Bathe*, 14 Q. B. D., p. 342.

(*i*) *Barrack* v. *M'Cullock*, 3 Kay & J. 110; *Nelson* v. *Booth*, 5 W. R. 722; *Birkett* v. *B.*, 24 T. L. R. 284.

date of the judgment, and against such income the judgment can be enforced (*k*).

12. Protection and Recovery of Separate Property.

Where property was settled to the separate use of a married woman, she would be protected in the enjoyment of it by Courts of equity; and her husband would, if necessary, be restrained by injunction from interfering with it (*l*).

But although it is clear that the Court can interfere to protect property, as, for instance, a house in which a married woman resides settled to her separate use, against the interference of her husband, if he wishes to deal with it as his property and to deprive the wife of her property therein (*m*), some doubt has been expressed whether she is entitled to exclude her husband from such place and from exercising his right as a husband when he is not seeking to interfere with her proprietary rights (*n*). It appears, however, to be now settled that although there is a *prima facie* duty on husband and wife to live together, nevertheless, under special circumstances, as where the husband has behaved in a way which would entitle the wife to resist proceedings for restitution of conjugal rights, she may obtain an injunction to restrain her husband from entering the house in which she is living and which belongs to her for her separate use (*o*).

Where a married woman to whom a sum of money was payable for her separate use, received a cheque from the Accountant-General, and handed it over to her solicitor, who accompanied her, the solicitor was, on motion, ordered to pay the balance to his client; and it was held that the onus being upon the solicitor to show cause for not paying it at once, he could not set up a voluntary agreement to pay a debt due to him from her husband out of it (*p*). But where a husband had exercised his legal right by assigning to a purchaser for value without notice, his wife's separate property, she had no remedy against the purchaser (*q*).

(*k*) *Loftus* v. *Heriot*, [1895] 2 Q. B. 212; *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.

(*l*) *Green* v. *G.*, 5 Ha. 400 (n.); *Taylor* v. *Meads*, 34 L. J. Ch. 203; *Allen* v. *Walker*, L. R. 5 Ex. 187, 190; *Wood* v. *W.*, 19 W. R. 1049.

(*m*) *Symonds* v. *Hallett*, 24 Ch. D. 346.

(*n*) See *Weldon* v. *De Bathe*, 14 Q. B. D., p. 345; *Gaynor* v. *G.*, [1901] 1 Ir. R. 217.

(*o*) *Shipman* v. *S.*, [1924] 2 Ch. 140.

(*p*) *Mawhood* v. *Milbanke*, 15 B. 36.

(*q*) *Dawson* v. *Prince*, 2 De G. & J. 41.

Hulme v. Tenant.

By the Married Women's Property Act, 1882, s. 12, it is enacted that, " Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a *feme sole*, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section it shall be sufficient to allege such property to be her property; and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding : Provided always, that no criminal proceedings shall be taken by any wife against her husband by virtue of this Act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife " (*r*).

These provisions have been adopted in the Larceny Act, 1916, s. 36 (*s*).

A married woman can now alone sue a person for trespass in having entered a house which is her separate property against her will, although he did so with the authority of her husband, for the purpose of examining her as to her sanity, and though he did not do any injury to her house (*t*). Proceedings can only be taken hereunder by a wife against her husband for protection and security of her separate estate, not for personal libel (*u*) or malicious prosecution (*x*).

13. Restraint upon Anticipation or Alienation.

When once it was established that the separate property of a married woman must be so far enjoyed by her as a *feme sole*, as to bring with it all the incidents of property, and that she might there-

(*r*) *R.* v. *Streeter*, [1900] 2 Q. B. 601; *R.* v. *James*, [1902] 1 K. B. 540; *Larner* v. *L.*, [1905] 2 K. B. 539; *Shipman* v. *S.*, [1924] 2 Ch. 140.

(*s*) See *R.* v. *Creamer*, [1919] 1 K. B. 564, following *R.* v. *James*, *supra*.

(*t*) *Weldon* v. *De Bathe*, 14 Q. B. D. 344.

(*u*) *R.* v. *Lord Mayor of London, etc.*, 16 Q. B. D. 772.

(*x*) *Tinkley* v. *T.*, 24 T. L. R. 691.

fore dispose of it as a *feme sole*, it was found that, to secure her the desired protection against the influence and control of her husband, it was necessary to insert in settlements and wills *a clause restraining the wife from anticipating or alienating her separate property*. This clause was first inserted in Miss Watson's settlement, by the advice of Lord Thurlow, who was a trustee (*y*). It is an anomaly introduced by the Court of Chancery for the protection of the married woman against her own acts and her own weakness, and she cannot override it by doing any act or suffering any default, and the jurisdiction of the Court over it is measured by the married woman's own power (*z*). It can only exist in respect of a married woman's separate estate equitable or statutory (*a*); though it can be annexed to property given to her and becoming her separate estate under the Act of 1882 without the use of the words declaring a separate use (*b*), and it is valid whether the subject-matter be real or personal estate, or whether her interest therein be in fee or for life only (*a*).

Where a woman is seised of an equitable estate tail to her separate use, a clause restraining her alienation of the rents during her life will not prevent her from barring the entail and acquiring the fee (*c*).

In Re Bown (*d*) the testatrix directed her trustees to raise and invest £4,500 upon trust for *Robert Bown* for life and after his death as to £1,500 part thereof *in trust for and to pay* (*e*) *the same to Bessie O'Halloran* (a married woman) *for her sole and separate use*, and it was declared that the interest which any female might take under the will should be for her sole and separate use, and *without power to anticipate* the same and for which her receipt alone should be a sufficient discharge. Robert Bown having died, it was held by the C. A. upon the terms of the will that Bessie O'Halloran was entitled to have the fund paid over to her. The Court laid it down that the question whether the restraint imposed by a clause against anticipation is effectual, does not depend upon whether the gift is of an income-bearing fund or of a sum of cash, but upon

(*y*) *Pybus* v. *Smith*, 3 Bro. Ch. 347; *Jackson* v. *Hobhouse*, 2 Mer. 487; *Hood-Barrs* v. *Heriot*, [1896] A. C., at pp. 178, 183.

(*z*) *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B., at p. 566; Law of Property Act, 1925, s. 169, replacing section 7 of Conveyancing Act, 1911.

(*a*) *Baggett* v. *Meux*, 1 Ph. 627; *Stogdon* v. *Lee*, [1891] 1 Q. B. 661; *Re Sykes' Trusts*, 2 John. & H. 415.

(*b*) *Re Lumley*, [1896] 2 Ch. 690.

(*c*) *Cooper* v. *Macdonald*, 7 Ch. D. 288.

(*d*) 27 Ch. D. 411; see *Re Bankes*, [1902] 2 Ch. 333.

(*e*) See *Re Tippett & Newbould's Cont.*, 37 Ch. D., at p. 448.

whether the testator (in the case of a disposition by will) has or has not shown an intention that the trustees shall keep the fund and pay the income to the married woman.

Where, however, the income has *actually accrued due*, the clause against anticipation is no longer applicable (*f*).

Although interest for many purposes is treated as accruing due *de die in diem*, a married woman upon whom the fund out of which it proceeds is settled to her separate use without power of anticipation, cannot effectually assign an apportioned part of the interest up to the date of the assignment (*g*).

If, therefore, the income to which the restraint applies has not accrued due at or before the date of a judgment recovered against the married woman, such income cannot be taken in execution (*h*).

Although ordinarily the income of property, settled to the separate use of a married woman, is liable to make good a loss occasioned by her own breach of trust, if there be a clause against anticipation, future income during coverture would not be so liable (*i*).

There is no equity to apply income which a married woman is restrained from anticipating to make good the consequences of her fraud (*k*). And the result is the same where the wife joins with her husband in fraudulently concealing from a mortgagee the restraint against alienation (*l*). Neither can her separate estate restrained from anticipation be bound by estoppel. In *Bateman* v. *Faber* (*m*) a married woman, by deed poll, admitted (contrary to fact) that her life interest restrained against anticipation in certain property had determined and released all her interest therein in favour of her husband. On the faith of that deed a creditor of the husband reduced the rate of interest on a loan previously made to the husband, and arrangements were made for payment on terms beneficial to the husband. The wife subsequently claimed to receive the income for her life. It was held that neither by estoppel nor admission could she by her own act get rid of the

(*f*) *Hood-Barrs* v. *Heriot*, [1896] A. C. 174.

(*g*) *Re Brettle*, 2 De G. J. & S. 79.

(*h*) *Hood-Barrs* v. *Cathcart*, [1894] 2 Q. B. 559; *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48; *Bolitho* v. *Gidley*, [1905] A. C. 98.

(*i*) See *Pemberton* v. *M'Gill*, 1 Dr. & Sm. 266; *Hood-Barrs* v. *Heriot*, [1896] A. C., at p. 180; *Whiteley* v. *Edwards*, [1896] 2 Q. B. 48.

(*k*) *Jackson* v. *Hobhouse*, 2 Mer. 483; *Arnold* v. *Woodhams*, 16 Eq. 29.

(*l*) *Stanley* v. *S.*, 7 Ch. D. 589; *Cahill* v. *C.*, 8 A. C. 420; *Bateman* (*Lady*) v. *Faber*, *infra*, note (*m*).

(*m*) [1897] 2 Ch. 223; [1898] 1 Ch. 144.

protection given to her by the restraint on anticipation, and that she was entitled to receive the income for her life.

In *Peillon* v. *Brooking* (*n*), the testator's daughter had, before the date of the will, married a Frenchman who was domiciled abroad. The testator gave his residuary estate to trustees upon trust for sale and investment and to pay the income to his daughter for life for her separate use without power of anticipation. It was held that the restraint was effectual, notwithstanding that it was not recognised by the law of the place where the husband was domiciled.

What Words will restrain Alienation.—As in the case of the separate use, no particular form of words is necessary to impose the restraint (*o*). Where, therefore, there was a declaration that the *receipt of the wife*, or any person to whom she should appoint the income of property, *after the same should become due*, should be a valid discharge, it was held that she was restrained from alienation (*p*). So also when the receipt of the married woman to trustees for rents bequeathed to her separate use for life was to be given as the same *should become due from time to time* (*q*). So where property is given to the separate use of a married woman "not to be sold or mortgaged" (*r*), or where it is given to her sole, separate, and *inalienable use* (*s*).

In *Baggett* v. *Meux* (*t*), a testator devised real estate to his daughter, a married woman, in fee, but with a declaration *that she should not sell, charge, mortgage, or incumber* it, followed by another declaration, that she should take it for her own sole and separate use and benefit and disposal, and have the sole management thereof, independent of her husband, and free from his control or intermeddling. It was held that the restraining clause was not void, inasmuch as it must be taken in connection, as well with the succeeding as the preceding words; and, therefore, that a security, by way of equitable mortgage, executed by the husband and wife to a party who had notice of the wife's title under the will, was void as against the wife.

(*n*) 25 B. 218.

(*o*) *Hood-Barrs* v. *Cathcart* (*No.* 2), [1894] 2 Q. B., at p. 569; *Re Lavender's Policy*, [1898] 1 Ir. R. 175.

(*p*) *Field* v. *Evans*, 15 Si. 375; *Baker* v. *Bradley*, 7 De G. M. & G. 597; *Estate of H. H. Molyneux*, 6 Ir. R. Eq. 411.

(*q*) *Re Smith*, 51 L. T. 501; *Baker* v. *Bradley*, 7 De G. M. & G. 597.

(*r*) *Steedman* v. *Poole*, 6 Ha. 193.

(*s*) *D'Oechsner* v. *Scott*, 24 B. 239; *Spring* v. *Pride*, 4 De G. J. & S. 395.

(*t*) 1 Coll. Ch. R. 138; 1 Ph. 627.

Hulme v. Tenant.

But the restraint upon alienation will not be effectual unless it be clear (*u*). A direction that the wife is to have a right to receive property "with her own hands," or, "with her own hands from time to time," or equivalent expressions are, to use the words of Lord Eldon, "only an unfolding of all that is implied in a gift to the separate use" (*x*).

Where a testator, having bequeathed a sum of stock in trust for the separate use of his wife for her life, directed that it "*should remain during her life and be, under the orders of the trustees, made a duly administered provision for her, and the interest of it to be given to her, on her personal appearance and receipt*," by the banker the trustee might appoint; it was held by Cranworth, V.-C., that the wife was not prohibited from alienating her interest in the stock (*y*).

The mere expression of a wish that property devised to a female should not be sold or disposed of has been held insufficient to create a restraint on anticipation (*z*).

As to the insertion of a clause against anticipation in the case of executory trusts, see the cases cited below (*a*).

Where a person having power to appoint among a class not born at the date of the instrument creating the power, as for instance the children under a marriage settlement, makes an appointment to the separate use of a daughter (whether the daughter is, or is not, married at the date of the appointment), with a clause against anticipation, the provision restraining anticipation will be rejected, as offending the rule against perpetuities, but the gift will otherwise hold good (*b*). The language, however, may be such as to confine the restriction to tenants for life living at the date of the creation of the power: and is then valid (*c*). And a restraint on anticipation, imposed by a general clause in a will upon all the shares of

(*u*) *Clarke* v. *Pistor*, cited 3 Bro. Ch. 568; *Pybus* v. *Smith*, 3 Bro. Ch. 340; *Brown* v. *Like*, 14 V. 302; *Sturgis* v. *Corp*, 13 V. 190.

(*x*) See *Parkes* v. *White*, 11 V., at p. 222; *Acton* v. *White*, 1 S. & S. 429; *Rose* v. *Sharrod*, 11 W. R. 356.

(*y*) *Re Ross's Trust*, 1 Si. (N.S.) 196; see also *Wagstaffe* v. *Smith*, 9 V. 520, 524; *Alexander* v. *Young*, 6 Ha. 393; *Hastie* v. *H.*, 2 Ch. D. 304.

(*z*) *Re Hutchings to Burt*, 59 L. T. 490. Cf. *Re Lavender's Policy*, [1898] 1 Ir. R. 175.

(*a*) *Teasdale* v. *Braithwaite*, 5 Ch. D. 630; and see *Hastie* v. *H.*, 2 Ch. D. 304; and *Re Dunnill*, 6 Ir. R. Eq. 322, 326; *Dowd* v. *D.*, [1898] 1 Ir. R. 244, 251.

(*b*) *Fry* v. *Capper*, Kay, 163; *Re Michael's Trusts*, 46 L. J. Ch. 651; *Re Cunningham's Settlement*, 11 Eq. 324; *Re Teague's Settlement*, 10 Eq. 564; *Shute* v. *Hogge*, 58 L. T. 546; *Whitby* v. *Mitchell*, 42 Ch. D. 494.

(*c*) *Armitage* v. *Coates*, 35 B. 1.

daughters of the testator's children, is good as to the shares of those members of the class who are born in the testator's lifetime though void as to the shares of those born afterwards (*d*).

The important provisions of section 19 of the Married Women's Property Act, 1882, require to be borne in mind.

Section 19. "Nothing in this Act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman, *or shall interfere with, or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will or other instrument.* But no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's *own* property to be *made or entered into by herself* shall have any validity against *debts contracted by her before marriage*, and no settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors."

The latter part of this section—commencing with the words, "But no restriction against anticipation"—only applies, it seems, to settlements made after the coming into operation of the Act (*e*).

"Before marriage" means before the existing marriage. A married woman contracted a debt, judgment was recovered against her in 1886, and she afterwards obtained a decree absolute and married again; her property was settled to her separate use without power of anticipation. *Held*, the restraint was void and her property was liable (*f*); but judgment on an ante-nuptial debt is not enforceable against separate property subject to restraint where the settlement was *not* made by the married woman (*g*).

14. Marriage Settlements and section 19 of the Act of 1882 and section 2 of the Act of 1907.

Whatever interest in property a married woman takes after the Act of 1882 is hers as statutory separate estate, and it is now

(*d*) *Re Russell*, [1895] 2 Ch. 698; *Re Ferneley's Trusts*, [1902] 1 Ch. 543; *Re Game*, [1907] 1 Ch. 276.

(*e*) *Beckett* v. *Tasker*, 19 Q. B. D. 7, 12.

(*f*) *Jay* v. *Robinson*, 25 Q. B. D. 467.

(*g*) *Birmingham Excelsior, etc.* v. *Lane*, [1904] 1 K. B. 35; cf. *Axford* v. *Reid*, 22 Q. B. D. 548, a case under the Married Women's Property Act, 1870.

impossible to convey property to her in such a way that she and her husband shall be in the same position in regard to it that they were in at common law or in equity prior to the Act (*h*). The first part of section 19 was apparently inserted not only to preserve unimpaired existing settlements, but also to secure as full an operation to future settlements as could have been obtained at the date of the passing of the Act. That part received, however, a very wide interpretation. The words "interfere with or affect" were construed as meaning "invalidate or render inoperative," and it was said that the second clause of section 19 showed that interfering with a settlement meant something different from affecting an estate created by it (*i*).

In referring to this section, Stirling, J., said in *Re Onslow* (*k*), "It seems to follow that the effect of the settlement will be determined just as it was before the Act, and no one, who, under the old law, could have taken any interest is to be deprived of such interest, but where these principles have been applied and it has been ascertained that a married woman takes an interest, the incidents attached by the Act to the property of married women apply."

In cases where settlements dated before 1883 contained covenants to settle the wife's after-acquired property, excepting property settled to her separate use, it has been held that property to which she became entitled after the Act did not come within the exception in the covenant of property settled to her separate use, as that would have been to interfere with the marriage settlement and so contrary to section 19 (*l*).

In *Stevens* v. *Trevor-Garrick* (*m*), a lady, an infant, by settlement made in 1890 in contemplation of marriage (the settlement not being made under the Infants' Settlement Act, 1855) joined with her husband in assigning a sum of £1,000 to which she was entitled. In 1891 she attained twenty-one and disaffirmed the settlement. It was held that as, but for the Act of 1882, the assignment by the husband alone would have been sufficient, section 19 applied and the fund was bound by the settlement (*n*).

(*h*) See *Re Onslow*, 39 Ch. D. 622; *Re Lumley*, [1896] 2 Ch. 690, 694; *Re Davenport*, [1895] 1 Ch. 361; *Re Williams*, 76 L. T. 150.

(*i*) *Re Armstrong*, 21 Q. B. D. 264, *per* Lindley, L.J., at pp. 270 *et seq.*

(*k*) 39 Ch. D. 625; and see *Re Stonor*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *H.*, 38 Ch. D. 78, 90; *Re Williams*, 76 L. T. 150.

(*l*) *Re Stonor*, 24 Ch. D. 195; *Re Whitaker*, 34 Ch. D. 227; *Re Crook's Settlement*, [1923] 2 Ch. 339, 346.

(*m*) [1893] 2 Ch. 307.

(*n*) And see *Hancock* v. *H.*, 38 Ch. D. 78, 90.

Hulme v. Tenant.

Again, in *Buckland* v. *B.* (*o*) it was held that an agreement by an intended husband with the trustees of his infant intended wife's marriage settlement that property then in the hands of the trustees should be settled bound the property, since it would have bound the property had the Act of 1882 not been passed.

Under the Married Women's Property Act, 1907, s. 2, however, a settlement made after the commencement of that Act, by the husband or intended husband, of property of the wife, will not be valid (except in a case where the wife is an infant and dies without attaining twenty-one) unless executed by her if she is of age, or confirmed by her after she attains full age.

15. Duration and Extent of Separate Use and of Restraint on Anticipation, and when the latter can be dispensed with.

As the separate use, and the restraint upon alienation, which is a modification of it (although now recognised by statute) are creatures of equity called into existence merely for the purpose of securing to the wife the enjoyment of her own property free from marital rights and influence, they exist only when they are necessary for that purpose. Thus, property given to the separate use of a woman, although subject to restraint upon anticipation, might be aliened by her at any time when she was discovert (*p*); that is to say, when she was a *feme sole* before marriage (*q*), or when she was a widow after her husband's death (*r*), or after she had obtained a decree for judicial separation (*s*), or divorce (*t*); and it is settled, by the leading case of *Tullett* v. *Armstrong* (*u*), that although the separate estate, whether modified by restraint or not, is *suspended* while a woman is discovert, it revives upon a subsequent marriage.

Lord Langdale, M.R., said (*x*): "In respect of a married woman's separate estate, she is, by the Court, considered as a *feme sole*, although covert. Her faculties as such, and the nature and

(*o*) [1900] 2 Ch. 534.

(*p*) *Tullett* v. *Armstrong*, 1 B. 1; affirmed 4 My. & C. 377; *Re Chrimes*, [1917] 1 Ch. 30.

(*q*) *Woodmeston* v. *Walker*, 2 Russ. & M. 197; *Brown* v. *Pocock*, 2 My. & K. 189; *Massey* v. *Parker*, *id.*, 174.

(*r*) *Jones* v. *Salter*, 2 Russ. & M. 208.

(*s*) *Munt* v. *Glynes*, 20 W. R. 823; see *Waite* v. *Morland*, 38 Ch. D. 135 (C. A.).

(*t*) See judgment of Lindley, L.J., *Watkins* v. *W.*, [1896] P., at p. 228.

(*u*) 1 B. 1; 4 My. & Cr. 377.

(*x*) 1 B., p. 32.

extent of them, are to be collected from the *terms in which the gift is made* to her, and will be supported by this Court for her protection. . . . If the gift be made for her sole and separate use, without more, she has, during the coverture, an alienable estate independent of her husband. If the gift be made to her sole and separate use, without power to alienate, she has, during coverture, the present enjoyment of an unalienable estate independent of her husband. In either of these cases she has, when discovert, a power of alienation; the *restraint is annexed to the separate estate only* (*y*), *and the separate estate has its existence only during coverture; whilst the woman is discovert, the separate estate, whether modified by restraint or not, is suspended, and has no operation* though it is capable of arising upon the happening of a marriage. The restriction cannot be considered distinctly from the separate estate, of which it is only a modification. . . . *If there be no separate estate, there can be no such restriction as that which is now under consideration* " (*z*).

A trust for the separate use of a woman might be confined to a particular coverture (*a*). But *prima facie*, the separate use, and (unless put an end to by the married woman whilst discovert) the restrain upon anticipation, will revive on a subsequent marriage (*b*).

Inasmuch as a woman has, *when discovert*, full power over property settled to her separate use, though coupled with a restraint against alienation, the question sometimes arises whether the woman has not by her acts acquired the property unrestricted and unfettered by any trust or restraint, so that neither attach upon her marriage as they would do in the absence of such acts (*c*). For instance, when stock has been given to *trustees* for the separate use of a woman, and she afterwards, when discovert, has called upon the trustees to sell the stock, and received from them the proceeds of the sale, the trust for her separate use is clearly at an end (*d*).

(*y*) But the restraint can be attached to property which is separate estate by statute, equally with that which is separate estate by rules of equity; see *Re Lumley*, [1896] 2 Ch. 690.

(*z*) See *Baggett* v. *Meux*, 1 Coll. Ch. R. 138; *Stogdon* v. *Lee*, [1891] 1 Q. B., at p. 670; *Re Gaffee*, 1 Mac. & G. 541; *Scarborough* v. *Borman*, 4 My. & C. 378; *Hawkes* v. *Hubback*, 11 Eq. 5.

(*a*) *Moore* v. *Morris*, 4 Drew. 33; *Shafto* v. *Butler*, 19 W. R. 595.

(*b*) *Hawkes* v. *Hubback*, 11 Eq. 5; *Re Gaffee*, 1 Mac. & G. 541; *Re Molyneux*, 6 Ir. R. Eq. 411.

(*c*) See *Re Chrimes*, [1917] 1 Ch. 30.

(*d*) *Per* Wood, V.-C., in *Wright* v. *W.*, 2 John. & H., at p. 655; see also *Mayd* v. *Field*, 3 Ch. D. 587; but see *Re Roper*, 39 Ch. D., at p. 490.

A woman, moreover, *when discovert*, has a right to call upon trustees for a transfer to her of property settled to her separate use, though it be without power of anticipation (*e*).

The question is more difficult when property has been left to the separate use of a woman *without the intervention of trustees*. The authorities before the Act of 1882, however, appear to decide that when a woman, having property so given to her, allows it to remain *in statu quo*, in the same form of investment in which it was given to her, then on her subsequent marriage her husband must be considered as adopting the property in the state in which it was left, and subject to the trusts which while in that state had been impressed upon it (*f*).

But if the woman, being *sui juris* and discovert, deals with the property so left to her, by selling, and spending part of the proceeds and converting the rest into property of a different kind, the trust will be at an end. In *Wright* v. *W.* (*g*), stock in the public funds was bequeathed to a woman for her separate use, without power of anticipation, but without the intervention of any trustee, and she afterwards, being discovert and *sui juris*, sold the stock and spent a portion of the proceeds, and invested the rest in shares of a joint-stock bank and Canada bonds. It was held that, by so doing, she determined the trust for her separate use. The mere circumstance of its being possible to trace the proceeds of the sale, cannot enable the Court, where once the *cestui que trust*, being discovert and *sui juris*, has converted the property from its original form, and has dealt with it as absolute owner, to treat the property into which the proceeds of the sale can be so traced as still subject to a trust for her separate use (*h*).

There is no distinction between a clause restraining anticipation and a clause restraining alienation, and therefore the share of a married woman in residuary real and personal estate given to her by will for her separate use *without power of anticipation*, is not bound by her covenant to settle after-acquired property (*i*). In *Re Bankes* (*k*) a legacy was left to a woman payable on the determination of a prior life interest, with a declaration that moneys payable to any female during any coverture should be

(*e*) *Buttanshaw* v. *Martin*, John. 89; *Re Chrimes*, *supra*.
(*f*) *Newlands* v. *Paynter*, 4 My. & C. 408.
(*g*) 2 John. & H. 647.
(*h*) *Ibid.*, at p. 655.
(*i*) *Re Currey*, 32 Ch. D. 361.
(*k*) [1902] 2 Ch. 333.

paid to her for her separate use when and as the same should become due and payable, and so that she should not have power to deprive herself of the benefit thereof by anticipation. It was held that the legatee was entitled on the death of the life tenant to have the legacy paid to her, and the restraint upon anticipation was therefore at an end and the sum was bound by her covenant to settle after-acquired property contained in an ante-nuptial settlement executed before the death of the testator. Where a marriage settlement settled a fund for the separate use of the wife *with restraint* on anticipation, and contained a covenant by the wife (then an infant) to settle future property, the C. A. held that she could not be compelled to elect between after-acquired property and her interest in the settled fund, but was entitled to retain both (*l*). A covenant in general terms to settle after-acquired property does not include a life interest or an annuity, in the absence of any indication in the settlement of a specific intention to include such interests (*m*).

If a covenant to settle after-acquired property in which the wife joins contains an exception of such as should be "otherwise settled," property coming by will to the wife to her separate use free from the debts, contracts, or engagements of her husband will be excluded from the operation of the covenant (*n*).

Where there was attached to the separate use of a married woman a clause against anticipation, the Court (apart from statute) has no power to *release* it from that restraint, even in cases where it would manifestly be for her benefit to do so (*o*). It is contrary to the principles of the Courts to allow a woman by her own conduct to discharge herself from the restraint (*p*). The Court therefore refuses to allow a sequestration to issue although the married woman is in contempt (*q*), and the Court has no power to order a settlement of her property subject to restraint, on her refusal to comply with a decree for restitution of conjugal rights (*r*).

Upon a petition for a settlement under section 45 of the Divorce

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(*l*) *Re Vardon*, 31 Ch. D. 275.

(*m*) *Re Dowling*, [1904] 1 Ch. 441.

(*n*) *Kane* v. *K.*, 16 Ch. D. 207; *Lloyd* v. *Prichard*, [1908] 1 Ch. 265.

(*o*) *Robinson* v. *Wheelwright*, 21 B. 214; 6 De G. M. & G. 535; *Smith* v. *Lucas*, 18 Ch. D. 531; *Gaskell's Trusts*, 11 Jur. (N.S.) 780; *Kenrick* v. *Wood*, 9 Eq. 333.

(*p*) *Re Glanvill*, 31 Ch. D. 532.

(*q*) *Hyde* v. *H.*, 13 P. D. 166.

(*r*) *Michell* v. *M.*, [1891] P. 208; see *Hood-Barrs* v. *Cathcart* (*Nos.* 1 & 2), [1894] 2 Q. B. 559.

Act, 1857, of the wife's property, after a decree for divorce against her, the Court has no jurisdiction, if the wife has married again, to order a settlement of property her interest in which she became entitled to under a will subject to a restraint upon anticipation (*s*).

It seems that the clause restraining a married woman from anticipation does not exempt her from the ordinary consequences of lapse of time and acquiescence (*t*), and that she can bind herself by a compromise with her trustees as to the amount of the sum settled to her separate use (*u*). But her separate estate restrained cannot be bound by estoppel (*x*).

In *Re Rush* (*y*), Mrs. Wolf, an Englishwoman, married in 1901 a German, and thereupon became a German national. A settlement, in English form, was executed upon the marriage, by which the income of certain funds was to be paid to her during her life and without power of anticipation during coverture. The Treaty of Peace Order, 1919, charged "all property, rights and interests . . . belonging to German nationals" with the payments therein mentioned. The C. A. held that the Order created a charge only upon the interest as it then existed, namely, subject to the restraint. But the House of Lords, restoring the decision of Russell, J., held that the charge created by the Peace Order over-rode the restraint and attached to Mrs. Wolf's interest notwithstanding the restraint. Lord Shaw adopted the following passage from the judgment of Russell, J.: "The charge created is a statutory charge. Even though the lady is herself prevented from effectively dealing with the income except as to income actually due, the beneficial ownership is in her. There may be a fetter on dominion, but she is the sole beneficiary. The interest belongs to her in every sense."

Statutory Powers in Court of dispensing with the Restraint.

By section 169 of the Law of Property Act, 1925, replacing section 7 of the Conveyancing Act, 1911, and re-enacting with amendment section 39, sub-section 1 of the Conveyancing Act, 1881, power is given to the Court, in any particular case, to remove the restraint on anticipation.

(*s*) *Loraine* v. *L.*, [1912] P. 222; *Garratt* v. *G.*, [1922] P. 230. Cf. *Morgan* v. *M.*, [1923] P. 3; and see observations of Earl Birkenhead in *Public Trustee* v. *Wolf*, [1923] A. C., at p. 556.

(*t*) *Derbishire* v. *Home*, 3 De G. M. & G. 80; *Davies* v. *Hodgson*, 25 B. 177.

(*u*) *Wilton* v. *Hill*, 25 L. J. Ch. 156.

(*x*) *Bateman* (*Lady*) v. *Faber*, [1898] 1 Ch. 144.

(*y*) [1922] 1 Ch. 302; [1923] 1 Ch. 56; [1923] A. C. 544.

Hulme v. Tenant.

By section 169, where a married woman is restrained from anticipation or from alienation in respect of any interest in property belonging to her, or is by law unable to dispose of or bind such property or her interest therein, including a reversionary interest arising under her marriage settlement, the Court may, if it thinks fit, where it appears to the Court to be for her benefit, by judgment or order, with her consent, bind her interest in such property.

The Court has only power to remove the restraint with respect to some particular disposition and not to remove it generally (*z*). The principles on which the Court will grant or refuse such an application were discussed by Chitty, J., in the case of *Re Pollard's Settlement* (*a*). The Court has first to consider whether it will be for *her* benefit, and the power is exercised with extreme caution, and only where a strong case for its exercise is made out (*b*). In *Re Blundell* (*c*) it was held by the Court of Appeal that mere increase of income was not a sufficient "benefit" to the married woman to justify the Court in removing the restraint so as to enable her to effect a change of investment from Court securities into others of a speculative nature, even though sanctioned by the settlement. In *Hodges* v. *H.* (*d*) foreign creditors of the wife (domiciled abroad) pressed her for payment of her debts, and, it being clear that on her death funds in Court would be assets for the payment of her debts, the Court directed that a portion of the funds should be paid out to her. The restraint has been released to enable married women absolutely entitled to convey, the purchase-money being paid to the trustees (*e*). In *Re Milner* (*f*) the restraint was removed *until further order*, to allow income to be applied in payment of policies and interest. In this case and *Re C.'s Settlement* (*g*) the husband got considerable benefit; but it was also in the interest of the wife and family that

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(*z*) *Re Warren*, 49 L. T. 696 (C. A.).

(*a*) [1896] 1 Ch. 901; affirmed, [1896] 2 Ch. 552; *Paget* v. *P.*, [1898] 1 Ch. 470.

(*b*) *Re Little*, 40 Ch. D. 418; and see *Tamplin* v. *Miller*, 30 W. R. 422; *Re Jordan*, 55 L. J. Ch. 330.

(*c*) [1901] 2 Ch. 221.

(*d*) Ch. D. 749; and see *Re Little*, 36 Ch. D. 701; *Sedgwick* v. *Thomas*, 48 L. T. 100; *Re Currey*, 56 L. T. 80, to enable leases to be granted; *Re Grove*, [1919] 1 Ch. 249.

(*e*) *Re Tippett and Newbould*, 37 Ch. D. 444; *Bates* v. *Kesterton*, [1896] 1 Ch. 159, 165.

(*f*) [1891] 3 Ch. 547.

(*g*) 56 L. J. Ch. 556.

the order should be made. In *Re Jordan* (*h*) the order was refused, as it might have caused a forfeiture of the woman's interest, and so in *Re Little* (*i*), as it would have enabled her to obtain a personal benefit by the release of a limited power of appointment among her children.

It may here be noted that a restraint on anticipation contained in the settlement does not prevent the exercise by a married woman tenant for life under the Settled Land Act, 1925, of any power under that Act (*k*).

By the Trustee Act, 1925, s. 62, re-enacting with slight amendments section 45 of the Trustee Act, 1893 (which itself replaced section 6 of the Trustee Act, 1888), it is provided :—

Section 62 (1) " Where a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court may, if it thinks fit, and *notwithstanding that the beneficiary may be a married woman restrained from anticipation*, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or persons claiming through him.

(2) " This section applies to breaches of trust committed as well before as after the commencement of this Act."

Independently of these statutory provisions, a beneficiary of full contracting capacity, who knowingly consents to a breach of trust is not entitled to relief against the trustee for loss occasioned by the breach, even though he has derived no benefit thereby (*l*). The statutory provisions were intended to enlarge the powers of the Court as to indemnifying trustees, and do not operate to curtail trustees' previously-existing rights and remedies (*l*). The law is not altered save by giving greater power to the Court (*m*). The principles which governed the grant of relief before the statutory change apply to the extended relief which can now be given. The Court, as a condition to assisting the trustee by allowing him to retain or charge a married woman's separate estate, required him to show that the charge or retainer was created by her with full knowledge of all the circumstances (*n*). Acquiescence in or approval

(*h*) 54 L. T. 127.
(*i*) 40 Ch. D. 418.
(*k*) Section 25, sub-section 2, re-enacting section 61, sub-section 6 of Settled Land Act, 1882.
(*l*) *Fletcher* v. *Collis*, [1905] 2 Ch. 24.
(*m*) *Bolton* v. *Curre*, [1895] 1 Ch. 544, 549.
(*n*) *Sawyer* v. *S.*, 28 Ch. D., 595, 603.

of the breach of trust was not sufficient ground for charging a married woman's separate estate (*o*). These principles are applicable where relief is asked for under this section, and were given effect to in *Bolton* v. *Curre* (*p*), where it was sought to impound a life interest restrained from anticipation. In that case Romer, J., said, "In my judgment it is the duty of a trustee to protect a married woman against herself when she, as a beneficiary restrained from anticipation, asks him to commit a breach of trust. And I do not think that a trustee ought to be allowed to deliberately commit a breach of trust at the request or with the consent of such a beneficiary in the hope and expectation that the Court will afterwards assist him by removing the restraint on anticipation and give him a security for the breach of trust which at the time he had no right to look to."

Under the Married Women's Property Act, 1893, s. 2, the Court can order payment of costs out of property subject to restraint (*q*).

By section 52 of the *Bankruptcy Act, 1914*, "where a married woman who has been adjudged bankrupt has separate property the income of which is subject to a restraint on anticipation, the Court shall have power, on the application of the trustee, to order that, during such time as the Court may order, the whole or some part of such income be paid to the trustee for distribution amongst the creditors, and in the exercise of such power the Court shall have regard to the means of subsistence available for the woman and her children."

16. Married Woman Trustee.

Section 24 of the Married Women's Property Act, 1882, provides that the word "contract" in the Act shall include the acceptance of any trust, or the office of executrix or administratrix, and protects the husband from liability unless he has acted or intermeddled; and section 18 enables a married woman who is an executrix or administratrix to act in such office as if she were a

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(*o*) *Sawyer* v. *S.*, 28 Ch. D., at p. 605.

(*p*) [1895] 1 Ch. 544; *Ricketts* v. *R.*, 64 L. T. 263; but cf. *Griffith* v. *Hughes*, [1892] 3 Ch. 105; and see *Re Holt*, [1897] 2 Ch. 525; *Molyneux* v. *Fletcher*, [1898] 1 Q. B. 648.

(*q*) See *supra*, p. 571; *Dresel* v. *Ellis*, [1905] 1 K. B. 574; and compare *Gordon* v. *G.*, [1904] P. 163; *Nunn* v. *Tyson*, [1901] 2 K. B. 487, and *Studley* v. *S.*, [1913] P. 119.

"*feme sole.*" In *Re Ayres* (*r*) it was held that it is not now necessary for the husband to join in the administration bond, and in *Re Hawksworth* (*s*), where it appears that money was to be paid to a married woman either as executrix or as trustee, Chitty, J., said that the words "on her separate receipt" were not necessary since the Act.

Section 18 of the Act of 1882 gives express power to a married woman to transfer certain stocks and funds vested in her as an executrix or trustee. In *Re Harkness, etc., Contract* (*t*), North, J., held that a married woman could not convey the legal estate in real estate vested in her as trustee without a deed acknowledged with the concurrence of her husband. But the law has been altered by the Married Women's Property Act, 1907, s. 1, which has now been replaced by section 170 of the Law of Property Act, 1925, which is in the following terms :—

Section 170 (1) "A married woman is able to acquire as well from her husband as from any other person, and hold, any interest in property, real or personal, either solely or jointly with any other person (whether or not including her husband) as a trustee or personal representative, in like manner as if she were a *feme sole;* and no interest in such property shall vest or be deemed to have vested in the husband by reason only of the acquisition by his wife.

(2) "A married woman is able, without her husband, to dispose of, or to join in disposing of, any interest in real or personal property held by her solely or jointly with any other person (whether or not including her husband) as trustee or personal representative, in like manner as if she were a *feme sole.*"

The section applies (by sub-section 3) to any woman married on or after January 1, 1883, and to any woman married before that date who became a trustee or personal representative on or after that date.

17. Pin-Money.

Pin-money may be described as an allowance settled upon the wife before marriage for expenditure on her person; it is to meet her personal expenses, and to deck her person suitably to her

(*r*) 8 P. D. 168.
(*s*) [1887] W. N., at p. 113.
(*t*) [1896] 2 Ch. 358; and cf. *Re Brooke and Fremlin, etc.*, [1898] 1 Ch. 647; *Re West and Hardy, etc.*, [1904] 1 Ch. 145.

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husband's dignity, that is to say, suitably to the rank and station of his wife (*u*).

When so settled, her savings thereout will be protected as her separate property, against her husband and those claiming under him. But when not so settled, her savings will be assets, for the payment of her husband's debts, in the hands of his executor (*x*).

It has been held that where the wife permits her pin-money to run in arrear, she cannot, on the death of her husband, claim arrears for more than one year prior to his death; for the very object of the allowance of pin-money being to enable the wife to deck her person suitably to her husband's rank without having recourse to him continually for small sums of money, excludes the supposition that she may accumulate her pin-money while her husband pays her bills (*y*).

Where, however, a wife from time to time *demanded* the arrears of her pin-money from her husband, and he promised that she should have it at last, it was held by Hardwicke, C., that she was entitled to all the arrears due at her husband's death (*z*). On the other hand, where a husband has paid for all the wife's apparel, and provided for all her private expenses, she cannot, it seems, at any rate where there is no evidence that she ever demanded her pin-money, claim for any arrears at the death of her husband (*a*).

The personal representatives of the wife cannot go back for a year or even any part of a year, for the arrears of pin-money, for the allowance of pin-money has relation only to the *personal* dress and expenses of the wife (*b*).

18. Paraphernalia.

The doctrine of the paraphernalia existed at common law, but may now be regarded as obsolete (*c*). It was the right which the wife could assert against her husband's executors (if he died solvent) to retain articles of apparel and ornaments, not forming part of her husband's separate estate, but which she had with her

(*u*) *Howard* v. *Digby*, 8 Bli. N. R., at p. 268.
(*x*) Williams, Exors. (11th ed.), at p. 686.
(*y*) *Peacock* v. *Monk*, 2 Ves. Sen. 190; *Howard* v. *Digby*, 8 Bli. N. R. 224, at. p. 267.
(*z*) *Ridout* v. *Lewis*, 1 Atk. 269.
(*a*) *Powell* v. *Hankey*, 2 P. W. 82; *Thomas* v. *Bennet*, 2 P. W. 341; *Fowler* v. *F.*, 3 P. W. 353.
(*b*) *Howard* v. *Digby*, 8 Bli. N. R., p. 245.
(*c*) *Masson Templier & Co.* v. *De Fries*, [1909] 2 K. B. 831, 839.

husband's approval been accustomed to wear. Such a right could now only exist (if at all) where the marriage has taken place before 1883, and where the articles in question were given before that date for use as paraphernalia. Even in such a case, moreover, the question would arise whether, the husband having the power under the Act of 1882 to make a direct gift to his wife, he must not be deemed to have changed the character in which the wife had possession of the articles so as to convert them from paraphernalia into separate estate.

JURISDICTION.

EARL OF OXFORD'S CASE (*a*).

13 Jac. 1. 1 Ch. Rep. 1.

Jurisdiction of Equity as to Proceedings at Law.

Principles on which equity restrains proceedings under a judgment obtained at law.

Magdalen College, 39 Hen. 8, seised in fee of the Rectory of Christ's Church, and the Covent Garden, without Aldgate, London, containing seven acres, demised them for seventy-two years rendering £40 per annum for the rectory, and £9 for the garden. And 17 Eliz. (fifty years of the said lease being expired), the Queen, at the suit of the said college, licensed them to alien, which they did, and then received for the rectory £25 per annum, and £15 for the garden. It being Her Majesty's intent that the college should be advanced greatly in profit, by having the rectory to them and their successors, discharged of the lease for years, which in present was worth to them but £50 per annum, the utmost rent; the same was accordingly performed by a conveyance to Her Majesty, and by Her Majesty to Spinola and the rectory, from Spinola to the college; after which, Spinola and the Earl of Oxford, his assignee, and his under tenants have built upon the garden one hundred and thirty houses, and therein bestowed £10,000, which assignee and his under tenants have bonds and security given for the enjoyment thereof, to the sum of £20,000.

Note.—The college is hereby advanced £1,700 more than they should have been if the former lease had continued, which is not yet expired.

(*a*) *S. C.*, Toth. 126 (et. 1823), *nom. Comes Oxon* v. *Neeth.*

Earl of Oxford's Case.

This conveyance having been in peace forty years, and thus advanced by the purchasers from a thing of little value to a great and considerable one; and it being a general case wherein persons of all degrees and callings have made purchases, they resting secure on its passing through the Crown, the greatest protection.

The present master of the college having by undue means obtained possession of one of the one hundred and thirty houses, whereof one Castillion was lessee, who, being secure of his title both in law and equity, sealed a lease thereof for three years to one Warren, who thereupon brought an ejectment against one John Smith, for trial of the title in B. R. Wherein a special verdict was had; and while that depended in argument the lease ended, and so no possession could be awarded for the plaintiff nor fruit had of his suit.

Yet he proceeded to have the opinion of the Judges to know the law (which was a voluntary act of his), to the intent, if the law were with him, he might begin a new suit at law, and spare to proceed in equity, and if the law were against him, that then he might proceed in Chancery. And the Judges of that Court having delivered their opinions against his title, before any judgment entered upon the roll, the Earl and Mr. Wood, for themselves and their lessees, preferred their bill in Chancery; and then judgment (*i.e.*, in the action in the King's Bench) was entered, *quod querens nil capiat per billam.*

To which bill in Chancery the defendant put in a plea and demurrer, alleging the conveyance to be void by the statute of 13 Eliz., and that they evicted one house, parcel of the premises, by judgment at law; which plea and demurrer were referred by order to Sir John Tindal and Mr. Woolridge, who reported that they thought it fit the cause should proceed to hearing, notwithstanding the plea and demurrer; and afterwards, in default of an answer, an attachment was awarded against the defendants, whereupon they were attached, and a *cepi corpus* returned, and by order of October 22, 13 Jac. 1, they were committed to the Fleet for their contempts in refusing to answer; and do now stand bound over to answer their contempts, they still refusing to answer.

Earl of Oxford's Case.

And now this term it was argued, that the defendants thus standing in contempt, etc., may be sequestered until answer.

Lord Chancellor Ellesmere.—* * *

The cause why there is a Chancery is, for that men's actions are so divers and infinite, that it is impossible to make any general law which may aptly meet with every particular act, and not fail in some circumstances.

The office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs, and oppressions, of what nature soever they be, and to soften and mollify the extremity of the law, which is called *summum jus.*

And for the judgment, etc., law and equity are distinct, both in their Courts, their Judges, and the rules of justice; and yet they both aim at one and the same end, which is *to do right;* as Justice and Mercy differ in their effects and operations, yet both join in the manifestation of God's glory.

But in this case, upon the matter there is no judgment, but only a discontinuance of the suit, which gives no possession; and although to prosecute law and equity together be a vexation, yet voluntarily to attempt the law in a doubtful case, and after to resort to equity, is neither strange nor unreasonable.

But take it as a judgment to all intents, then I answer, that in this case there is no opposition to the judgment, neither will the truth or justice of the judgment be examined in this Court, nor any circumstance depending thereupon, but the same is justified and approved; and therefore a judgment is no let to examine it in equity, so as all the truth of the judgment, etc., be examined.

No possession is established by the King's writ, after that any judgment is sought to be impeached; for when the plaintiff, by his lessee seeking relief at the common law, is barred, then is his time to seek relief in Chancery when the common law is against him; Doctor and Student, fol. 16. A serjeant is sworn to give counsel according to law,—that is, according to the law of God, the law of reason, and the law of the land; and upon both the laws of God and reason is granted that rule, *viz., To do as one would be done unto.*

And, therefore, where one is bound in an obligation to pay

money, payeth it, and takes no acquittance, by the common law he shall be compelled to pay the money again. But when it appeareth that the plaintiff will recover at law, the serjeant may advise the defendant to take a subpœna in Chancery, notwithstanding his oath.

So 1 Hen. 7, 14, if he deliver an acquittance without seal, or the money is paid within a short time after the day, or if he lose the acquittance, if judgment be had in any of these cases, the party may resort to equity (*b*).

Also, after judgment in those cases, if the party have a release, he may have an *audita querela*, which is a Latin bill in equity, if the other party's conscience be so large as to demand a double satisfaction. So, if the statute be entered into by duress or menace, though the party be in execution, yet he may avoid it by duress of imprisonment (*c*); and yet it is a judgment upon record; and so of a judgment by a confession and satisfaction, acknowledged by a letter of attorney, which is lost or cannot be produced.

And in the case of *Harning* v. *Castor* (*d*), in B. R. on an *audita querela* brought *per opinionem curiæ*, if a judgment be given upon an usurious contract, and it is part of the agreement to have a judgment, the defendant may avoid such judgment by an *audita querela*, or by a *scire facias*, brought upon the same.

So, if a judgment be had against an infant by covin, as if an infant be inveigled to be bail for one in any Court at Westminster, he may have an *audita querela* to avoid the same (*e*). So, if judgment be had by covin or collusion against an executor, to defraud the creditors, if it be pleaded in bar. The covin and collusion may be averred at law by replication, and the judgment frustrated thereby (*f*); and *note*, every outlawry is a judgment, yet the party may have remedy in conscience against him that caused him to be outlawed without just cause (*g*).

So, if one neglect to enrol his deed of bargain and sale, being

(*b*) 22 Ed. 4; & 7 Hen. 7, 11.
(*c*) 15 Ed. 4; Fitz. Nat. Brev. 104, L. 5, Ed. 4, Audita Querela, 27.
(*d*) Mich., 3 Jac.
(*e*) Trin., 7 Jac., *Markham* v. *Turner*, and 8 Hen. 6, 10.
(*f*) 3 Hen. 6, 36.
(*g*) Doctor and Student, lib. 2, cap. 21; 21 Hen. 7, 7; 9 Hen. 6, 20.

Earl of Oxford's Case.

his only assurance, as in *Jacques and Huntley's Case*, in this Court, 13° Junij, 1599, and the bargainor brings an *ejectione firmæ* against him, and hath judgment, the bargainee may resort to Chancery, and there be relieved, if not for the land, yet for the money paid.

And in *Morgan and Parry's Case* (*h*), a woman had an estate in a house for her life, dispunishable of waste, and yet she was enjoined not to commit waste in the house, contrary to the case of *Lewis Bowles* (*i*): (*quere*, if not because of the prejudice to him in remainder?)

By all which cases it appeareth, that when a judgment is *obtained by oppression, wrong, and a hard conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party*; and that, in such cases, the Judges also play the Chancellors; and that these are not within the statute (*k*); which is, that after a judgment given in the Court of our Sovereign Lord the King, the parties and their heirs shall be in peace until the judgment be undone by attaint or error.

But it is objected that this is a judgment upon a statute law.

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It seemeth, by the Lord Coke's report, in *Dr. Bonham's Case* (*l*), that statutes are not so sacred as that the equity of them may not be examined. For he saith that in many cases the common law hath such a prerogative as that it can control Acts of Parliament, and adjudge them void; as, if they are against common right or reason, or repugnant or impossible to be performed; and for that he vouches, 8 Edw. 3, 30; 33 Edw. 3, Cessavit, 41, 42; Nat. Brev. 209; Plowd. 110; 27 Hen. 6, Annuity 41; 21 Eliz. Rot. 303. And yet our books are, that the Acts and Statutes of Parliament ought to be reversed by Parliament (only), and not otherwise (*m*), and, upon that reason, the Lord Chancellors, since the device of the action to be brought

(*h*) Pasch., 27 Eliz.
(*i*) 11 Co. 79; 1 Roll. Rep. 177; Raym. 284.
(*k*) 4 Hen. 4, cap. 23.
(*l*) 8 Co. 118.
(*m*) Bro. tit. "Error," 65, etc.; and 7 Hen. 6, 28; 21 Ed. 4, 46; 29 Ed. 3, 24.

by Parsons upon the statute of 2 Edw. 6, have enjoined the stay thereof.

And the Judges themselves do play the Chancellors' parts upon statutes, making construction of them according to equity, varying from the rules and grounds of law, and enlarging them *pro bono publico*, against the letter and intent of the makers, whereof our books have many hundreds of cases (*n*). Will you, then, have equity suppressed in all cases wherein a judgment at law, or upon a statute, is had?

The use of the Chancery has been in all ages to examine equity in all cases, saving against the King's prerogative (*o*); then you must have a special statute to except the Chancellor. For general statutes do extend to all the particular usages of the great Courts at Westminster, especially of the Chancery, and especially for matters of equity.

In Chancery upon a recognisance, a capias may be awarded, and the proceedings of that Court shall close up the mouths of the Judges of the common law, notwithstanding the statute of Magna Charta, chap. 29: "Quod nullus liber homo capiatur aut imprisonetur nisi per legale judicium parium suorum vel per legem terræ."

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The statute of 5 Eliz. c. 9, of Perjury, directeth how perjury shall be punished, saving the authority of the Star Chamber; yet, for perjury, committed in Chancery, either in an affidavit or an answer, etc., if such perjury appear to the Chancellor, the party may be punished according to his direction.

Also, no Exchequer man hath privilege against a subpœna, for matters between party and party, where the King's interest cometh not in question, and yet their privilege hath several statutes that give strength thereunto; but the use and precedents of the Chancery are not altered by those laws.

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By 2 Edw. 4, 15, the Chancellor sits in Chancery according to an absolute and uncontrollable power, and is to judge accord-

(*n*) 15 Hen. 7, and 14 Hen. 7, 14; 42 Ed. 3, 6, etc.

(*o*) As 35 Hen. 6, 27; 11 Hen. 4, 16; and Doctor and Student, lib. 2, cap. 5, 16.

ing to that which is alleged and proved; but the Judges of the common law are to judge according to a strict and ordinary (or limited) power. . . .

NOTES.

1. Generally.
2. Modern legislation as to Supreme Court of Judicature, p. 622.
3. Powers of the High Court, p. 626.
4. Power to restrain proceedings in foreign Courts, p. 631.
5. Power to restrain applications for Acts of Parliament, p. 636.

1. Generally.

In the principal case, the facts are not clearly stated, but from the report of the proceedings at law (*p*), it appears that the jury found a special verdict setting out the facts. The conveyance to the Queen was conditional on the conveyance of the premises by her to Spinola (through whom the plaintiff derived his title) before a certain date, which condition had been duly performed. In the reign of James I the College entered one of the houses, built on the land conveyed, and leased it to the defendant. The questions arising in the proceedings at law were, first, was the conveyance, which was not in accordance with the statute 13 Eliz. c. 10, valid on the ground that the statute did not apply to the Crown; and, secondly, if the statute did apply, then was the conveyance made valid by the statute, 18 Eliz. c. 2, confirming all grants, etc., made to the Crown within the seven years preceding. The case was argued on the special verdict but not decided, as the plaintiff's lessor (the plaintiff in Chancery), on ascertaining that the Judges were of opinion that the Crown was bound by 13 Eliz. c. 10, and that 18 Eliz. c. 2, did not apply to the conveyance, preferred to take the proceedings in Chancery. After he had done so, judgment by default was entered for the defendants in the proceedings at law, and the defendants in the Chancery suit set up this judgment as a plea and demurrer.

In this case Lord Ellesmere examines the principles upon which equity formerly entertained jurisdiction to grant injunctions to stay proceedings at law. This subject is interesting historically, as having been the cause of a warm contention between Lord Ellesmere and Coke, L.C.J. (*q*).

(*p*) 11 Rep. 66, b.

(*q*) Hallam Const. Hist. i., 372 *et seq.*, and The Jurisdiction of the Court of Chancery Vindicated, 1 Ch. Rep., Append. I; Cary, 163.

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Equity never affected to examine or overrule a judgment at law, but prevented a party from making an unjust use of it such as Courts of law, could they have taken cognisance of the equitable circumstances, would not have permitted; for, as observed by the Lord Chancellor with reference to the principal case, "in that case there was no opposition to the judgment, neither would the truth or justice of the judgment be examined in the Court, nor any circumstance depending thereon; but the same was justified and approved, and therefore a judgment was no let to examine it in equity, so as all the truth of the judgment be not examined." And when, after citing various cases, he concludes "that when a judgment is obtained by oppression, wrong, and a bad conscience, the Chancellor will frustrate and set it aside, not for any error or defect in the judgment, but for the hard conscience of the party," he evidently means only that a party would be prevented from taking advantage of it if it was inequitable that he should do so.

Lord Ellesmere, in the principal case, has noticed certain instances in which the Court had interfered to stay proceedings at law, on account of some equity of which the plaintiff in equity could not take advantage at law (*r*).

2. Modern Legislation as to the Supreme Court of Judicature.

An attempt to confer equitable jurisdiction upon Courts of common law was made by the Common Law Procedure Act, 1854 (*s*), under which, by section 83, equitable pleas and replications might be made use of at law; but a narrow construction was put upon that Act by the Judges of the Courts of common law, who held that no equitable plea was good unless it disclosed facts which would entitle the defendant to a perpetual and unconditional injunction in equity (*t*).

By the Supreme Court of Judicature (Consolidation) Act, 1925 (*u*), which re-enacts substantially the corresponding provisions of the Supreme Court of Judicature Act, 1873 (*x*), it is provided that there shall be a Supreme Court of Judicature in England, consisting of His Majesty's High Court of Justice and His Majesty's

(*r*) See Kerr on Injunctions (6th ed.), p. 13.
(*s*) 17 & 18 Vict. c. 125.
(*t*) *Mines Royal Societies* v. *Magnay*, 10 Exch. 489; *Wood* v. *Copper Miners Co.*, 17 C. B. 561; *Wake* v. *Harrop*, 6 H. & N. 768, 1 H. & C. 202.
(*u*) 15 & 16 Geo. 5, c. 49.
(*x*) 36 & 37 Vict. c. 66.

Court of Appeal (*y*). The High Court is declared to be a superior Court of record, and there is vested in it (subject as otherwise provided in the Act) the jurisdiction formerly exercised by the Court of Chancery, and the Courts of Queen's Bench, Common Pleas and Exchequer, and such other jurisdiction as in the Act mentioned (*z*). And there is vested in the Court of Appeal (*inter alia*) the jurisdiction formerly vested in the Lord Chancellor and the Court of Appeal in Chancery when exercising appellate jurisdiction, as well as the jurisdiction formerly exercised by the Court of Exchequer Chamber (*a*). Law and equity are to be administered concurrently (*b*); equitable defences may be raised in any proceeding (*c*), and equities appearing incidentally are to be recognised (*d*). In all matters not particularly mentioned in the Act, in which there was formerly any conflict or variance between the rules of equity and common law, the rules of equity are to prevail (*e*). Section 41 takes the place of section 24, sub-section 5 of the Act of 1873, and is in the following terms—

"41. No cause or proceeding at any time pending in the High Court or the Court of Appeal shall be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might formerly have been obtained, whether unconditionally or on any terms or conditions, may be relied on by way of defence thereto:

"Provided that—

"(a) Nothing in this Act shall disable either of the said Courts, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it; and

"(b) Any person, whether a party or not to any such cause or matter, who would formerly have been entitled to apply to any Court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, in contravention of which all or any part of the proceedings in the cause or matter have been taken, may apply to the High Court or the Court of Appeal, as the case may be, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally, or so far as may be necessary

(*y*) Section 1.
(*z*) Section 18.
(*a*) Section 26.
(*b*) Section 36.
(*c*) Section 38.
(*d*) Section 40.
(*e*) Section 44.

for the purposes of justice, and the Court shall thereupon make such order as shall be just."

3. Powers of the High Court.

It will be observed that section 41 of the Act of 1925, like section 24, sub-section 5, of the Judicature Act, 1873, only applies to *pending* proceedings. There is nothing in the enactment to prevent an injunction being granted to restrain a person from *instituting* proceedings (*f*).

The Court has restrained a wife from suing for restitution of conjugal rights, contrary to the terms of a separation deed (*g*); and has restrained a person from presenting a petition for winding up a company (*h*), and from advertising a petition presented *mala fide* (*i*). An injunction has also been granted restraining proceedings in another Court against a receiver appointed in a debenture-holders' action (*k*).

A Judge of the Chancery Division cannot restrain a sheriff from the selling of goods taken in execution under a judgment of another Division; as such an injunction would, in effect, be in restraint of pending proceedings (*l*).

The jurisdiction of the Chancery Division to restrain proceedings pending in Courts not forming part of the Supreme Court of Judicature is not taken away.

In *The Teresa* (*m*), it was held that a Judge of the Admiralty Division had power in a salvage action to issue an injunction to restrain proceedings in the Liverpool Court of Passage. And in *Hedley* v. *Bates* (*n*), as explained in the judgment of the Master of the Rolls in *Stannard* v. *Vestry of St. Giles* (*o*), an injunction was granted to restrain proceedings before magistrates, where it appeared they had no jurisdiction and a prohibition might have been granted. In *Dyke* v. *Stephens* (*p*), an infant plaintiff in an action

(*f*) *Besant* v. *Wood*, 12 Ch. D., p. 630; and see *Hart* v. *H.*, 18 Ch. D. 670, 680

(*g*) *Besant* v. *Wood*, 12 Ch. D. 605.

(*h*) *Cercle Restaurant Castiglioni Co.* v. *Lavery*, 18 Ch. D. 555; *New Travellers' Chambers* v. *Cheese*, 70 L. T. 271.

(*i*) *Re A Company*, [1894] 2 Ch. 349.

(*k*) *Re Maidstone Palace, etc.*, [1909] 2 Ch. 283, 286.

(*l*) *Wright* v. *Redgrave*, 11 Ch. D. 24; cf. *Powell* v. *Jewesbury*, 9 Ch. D. 39; *Crowle* v. *Russell*, 4 C. P. D. 186.

(*m*) 71 L. T. 342.

(*n*) 13 Ch. D. 498.

(*o*) 20 Ch. D. 196. Cf. *Grand Junction Waterworks* v. *Hampton Urban Council* (No. 1), [1898] 2 Ch. 331.

(*p*) [1885] W. N. 177.

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in the Chancery side moved for an injunction to restrain an action in the Palatine Court to which he was not a party. Pearson, J., only allowed the plaintiff in the Palatine Court to proceed with his action on undertaking to submit to certain terms. But where, previously to the administration order in a creditor's action in the High Court, another creditor had obtained judgment in a County Court against the defendant, a sole executrix, the Court (in its discretion) refused to restrain him pursuing his remedy against the executrix personally (*q*).

By section 59 of the Judicature Act, 1925, any cause or matter may at any stage be transferred (by such authority and in such manner as rules of Court may direct) from one Division or Judge to another Division or Judge. By Order 59 of the Rules of the Supreme Court, such transfer may be made by the Lord Chancellor, subject to the proviso that no transfer is to be made from or to any Division without the consent of the President of the Division (*r*). And a cause or matter may be transferred from one Division to another, by order made by the Court or any Judge of the Division to which the cause or matter is assigned, but with the consent of the President of the Division to which it is proposed to be transferred (*s*).

Where a question raised in an action in one Division can be more conveniently determined in another Division—as, for instance, a question of specific performance raised in an action not brought in the Chancery Division—a transfer thereto may be made (*t*).

But a defendant sued in the King's Bench Division will not become entitled to have the action transferred to the Chancery Division merely by putting in a counterclaim for the specific performance of some contract relating to land between himself and the plaintiff (*u*).

The Court, however, will take notice of an equitable right to specific performance appearing incidentally in the course of an

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(*q*) *Re Womersley*, 29 Ch. D. 557; cf. *Re Thomas*, [1912] 2 Ch. 348.

(*r*) Rule 1.

(*s*) Rule 3.

(*t*) *Hillman* v. *Mayhew*, 1 Ex. D. 132; *Holloway* v. *York*, 2 Ex. D. 333 See also *London Land Co.* v. *Harris*, 13 Q. B. D. 540; *Johnson* v. *Moffat*, [1876] W. N. 21; *Holmes* v. *Hervey*, 25 W. R. 80. For the transfer of actions to the Commercial Court, see *Baerlein* v. *Chartered Mercantile Bank*, [1895] 2 Ch. 488; *Barry* v. *Peruvian Corporation*, [1896] 1 Q. B., at p. 209.

(*u*) *Storey* v. *Waddle*, 4 Q. B. D. 289; *Standard Discount Co.* v. *Barton*, 37 L. T. 581.

ejectment action, though there be no counterclaim for such performance (*x*).

So, where the defendant in an action in one of the Divisions of the High Court other than the Chancery Division relies on an equity —as, for instance, to have a deed set aside as part of his defence— the Division in which the action is brought must give effect to the equity so far as it is incidental to the purposes of the defence (*y*).

A transfer from the Chancery to the King's Bench Division will not be ordered merely because the action is one which ought to be tried by a jury, or is for damages only (*z*).

The fact that an action is brought by the Attorney-General at the relation of private individuals does not operate as an exercise of the Crown's prerogative to select the tribunal by which the action is to be tried, and consequently the discretion of the Court as to transfer is not interfered with (*a*).

The transfer does not alter the ground of action or the principles on which it is to be decided (*b*).

It will be seen that section 41 of the Judicature Act, 1925, contains a proviso that nothing in the Act is to disable the Court, from, if it thinks fit, directing a stay of proceedings in any cause or matter pending before it.

It is still material, therefore, to consider the cases in which such injunctions were granted. Application to stay proceedings must be made in the Court in which the proceedings are pending (*c*).

In administration actions a decree in a creditor's suit, on behalf of himself and all the other creditors, is a judgment for the benefit of all the creditors, and all powers of preference of the executor or administrator between creditors of equal degree cease to exist (*d*). All proceedings at law by any of them, whether the action were for an ascertained debt or for unascertained damages, as upon a breach of covenant, would, *after the decree*, have been restrained by injunction (*e*), but not until a decree was obtained, although a

(*x*) Jud. Act, 1925, s. 40; and see *Williams* v. *Snowden*, [1880] W. N. 124.

(*y*) *Mostyn* v. *The West Mostyn Coal and Iron Co., Ltd.*, 1 C. P. D. 145; *Breslauer* v. *Barwick*, 24 W. R. 901.

(*z*) *Cannot* v. *Morgan*, 1 Ch. D. 1; *Holmes* v. *Hervey*, 25 W. R. 80.

(*a*) *Att.-Gen.* v. *Wilson*, 83 L. T. 646.

(*b*) *Noble* v. *Edwardes*, 5 Ch. D., at p. 393; *The Gertrude*, 15 P. D., at p. 109.

(*c*) *Garbutt* v. *Fawcus*, 1 Ch. D., 155; and see *Re Artistic, etc., Co.*, 14 Ch. D., p. 505; *Wright* v. *Redgrave*, 11 Ch. D., p. 32.

(*d*) *Jones* v. *Jukes*, 2 V. 517; *Mitchelson* v. *Piper*, 8 Si. 64; *Irby* v. *I.*, 24 B. 525.

(*e*) *Morrice* v. *Bank of England*, Cas. t. Talb. 217, 3 Swans. appendix, at p. 573, 2 Bro. P. C. 465, Toml. edit.; *Paxton* v. *Douglas*, 8 V. 520; *Perry* v.

bill were filed (*f*), nor unless a decree gave a present right to go in and prove debts (*g*).

So, where, *before* an administration decree, the creditor of a deceased person had obtained judgment against the executrix of the deceased, and a garnishee order *nisi* against a debtor to the estate, the Court, after decree, refused to restrain proceedings on the garnishee order (*h*).

As a charging order, when made absolute, operated from the making of the order *nisi*, proceedings on a charging order, obtained before a decree for administration but made absolute after the decree, would not be restrained (*i*).

Where, however, a creditor obtained a judgment against the executor, and on the *same day* a decree was made for the administration of the estate, it was held that it ought to be considered that the judgment and decree were obtained at the same moment, and that the judgment creditor could only come in *pari passu* with the other creditors (*k*).

A creditor, who before a decree for administration *actually obtained a judgment*, though unregistered (*l*), would, as against an executor, have priority in the administration of assets over the debts of all other creditors having debts of equal rank with that for which judgment was recovered (*m*); because, although by the statute 32 & 33 Vict. c. 46 (*n*), the distinction between specialty and simple contract debts in the administration of assets was abolished, it did not alter the rule that a creditor, who obtained judgment in legal proceedings against the legal personal representative, was entitled to be paid in priority over all other creditors (*o*).

After a decree or order on summons for the administration of an

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Phelips, 10 V. 34; *Drewry* v. *Thacker*, 3 Swans. 529, 541; *Clarke* v. *Ormonde*, Jac. 108, 123; *Rouse* v. *Jones*, 1 Ph. 462; *Vernon* v. *Thellusson*, 1 Ph. 466.

(*f*) *Rush* v. *Higgs*, 4 V. 638; *Teague* v. *Richards*, 11 Si. 46; *Vincent* v. *Godson*, 3 De G. & Sm. 717; *Marriage* v. *Skiggs*, 4 De G. & J. 4; cf. *Nokes* v. *Gandy*, 17 Eq. 297.

(*g*) *Ranken* v. *Harwood*, 5 Ha. 215, 223; cf. *Lee* v. *Park*, 1 Keen, 714.

(*h*) *Fowler* v. *Roberts*, 2 Gif. 226.

(*i*) *Haly* v. *Barry*, L. R. 3 Ch. 452; cf. *Re Printing, etc., Co.*, 8 Ch. D. 535; *Stewart* v. *Rhodes*, [1900] 1 Ch. 386.

(*k*) *Parker* v. *Ringham*, 33 B. 535.

(*l*) *Jennings* v. *Rigby*, 33 B. 198; *Gaunt* v. *Taylor*, 3 Man. & Gr. 886; as to costs see *Re Griffith*, [1904] 1 Ch. 807.

(*m*) *Dolland* v. *Johnson*, 2 Sm. & G. 301.

(*n*) Repealed by the Administration of Estates Act, 1925; see now section 34, sub-section 1, and the First Schedule, Part I of that Act.

(*o*) *Re Williams' Estate*, 15 Eq. 270; *Re Stubbs' Estate*, 8 Ch. D. 154.

estate, a legatee would be restrained from proceeding to recover a legacy, and that notwithstanding the legatee submitted to take a judgment against the executor *de propriis bonis*, alleging a devastavit (*p*), but the legatee would be entitled to his costs down to the time of his being served with notice of the administration.

If a creditor continued proceedings at law after a notice of a decree for administration, he could be ordered to pay the costs of a motion to restrain him from further proceedings, but he would be allowed to set them off against the costs of the proceedings incurred prior to the notice (*q*).

When an estate is administered and the residue is paid over under an order of the Court, the executor will be protected and a creditor will not afterwards be allowed to sue him at law (*r*).

After an estate has been fully administered in the Court, an executor will not be permitted without the leave of the Court to prosecute an action to recover part of the testator's property from a party to the suit (*s*); on the principle that an action, in which the same points are raised as have already been dealt with in another action, will be stayed except as to points not so raised (*t*).

The principles upon which a creditor was restrained from proceeding at law after a decree for administration were held not applicable to the case of a creditor in bankruptcy proceeding in a foreign country against a bankrupt having real estate there after a fiat of bankruptcy in this country (*u*).

Foreign creditors, moreover, will not be restrained from obtaining payment out of the English assets until English creditors are paid in full (*x*); but where a person died domiciled in Ireland leaving property in Ireland and England, and the same executors in both countries, it was held by Kindersley, V.-C., that an Irish judgment had priority over English simple contract creditors against Irish property remitted to and being administered in England by the executors (*y*).

(*p*) *Ratcliff* v. *Winch*, 16 B. 576; but see *Powell* v. *P.*, 12 Ir. Eq. R. 501; *Molyneux* v. *Scott*, 3 Ir. Ch. R. 291.

(*q*) *Gardner* v. *Garrett*, 20 B. 469; *Beauchamp* v. *Huntley*, Jac. 546.

(*r*) *Dean* v. *Allen*, 20 B. 1; *Bennett* v. *Lytton*, 2 John. & H. 155; *Micklethwaite* v. *Winstanley*, 34 L. J. Ch. 281; *Dodson* v. *Sammell*, 29 L. J. Ch. 335; *Molran* v. *Broughton*, [1900] P. 56; see also the Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 26 and 27.

(*s*) *Oldfield* v. *Cobbett*, 5 B. 132, 6 B. 515; cf. *Frank* v. *Basnett*, 2 My. & K. 618.

(*t*) *Re Aird*, 26 W. R. 441.

(*u*) *Pennell* v. *Roy*, 3 De G. M. & G. 126.

(*x*) *Re Brett*, 29 L. J. Ch. 296.

(*y*) *Cook* v. *Gregson*, 2 Dr. 286.

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Ordinarily, after a winding-up order has been obtained against a company, a creditor cannot proceed against the company (*z*), and by section 140 of the Companies Act of 1908, at any time after presentation of a petition for winding-up and before a winding-up order, the company, or any creditor or contributory may apply for a stay of any proceedings pending against the company. If the proceedings are pending in the High Court or Court of Appeal, the application to stay must be made to the Court in which the proceedings are pending; but if the proceedings are pending in one of the inferior Courts, the application to stay must be made to the Court having jurisdiction in winding-up. After a winding-up order, all applications to stay are made to the Court having jurisdiction in the winding-up.

The Court has an inherent jurisdiction to stay proceedings which are an abuse of its process (*a*); and this power is preserved by section 41 of the Judicature Act, 1925, replacing section 24, subsection 5, of the Act of 1873.

By Order 25, r. 4, the Court or a Judge may order any pleading to be struck out as disclosing no reasonable cause of action or answer; and where an action or defence is shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

The Court, moreover, will not allow a company, or directors of a company, " to be sude by a multitude of shareholders in a multitude of separate actions, each of which is instituted on behalf of all the shareholders," for the same act or alleged breach of trust, and therefore the Court has power to stop all but one of the actions, if they are all for the same thing (*b*).

It sometimes happens that the Court allows one action to proceed for one purpose, and another for another purpose—that is, that the Court excises from one action so much of the relief as can

(*z*) *Re London Suburban Bank*, 19 W. R. 950; *Re Artistic Colour Printing Co.*, 14 Ch. D. 502; *Re General Service, etc., Stores*, [1891] 1 Ch. 496; and *Ex p. Reynolds*, 15 Q. B. D. 169; *Re Great Ship Co.*, 4 De G. J. & S. 63; *Re Printing, etc., Co.*, 8 Ch. D. 535; *Re Hill Pottery Co.*, 1 Eq. 649; *Re Vron Colliery Co.*, 20 Ch. D. 442; *Anglo-Baltic, etc., Bank* v. *Barber & Co.*, [1924] 2 K. B. 410.

(*a*) *Metropolitan Bank* v. *Pooley*, 10 A. C. 210; *Chaffers* v. *Goldsmid*, [1894] 1 Q. B. 186; *Re Norton's Settlement*, [1908] 1 Ch. 471; *Cohen* v. *Rothfield*, [1919] 1 K. B. 410.

(*b*) *M'Henry* v. *Lewis*, 22 Ch. D. 397, 404; *Cohen* v. *Rothfield*, *supra*. See also *Commissioners of Sewers* v. *Gellatly*, 3 Ch. D. 610; *Cox* v. *Mitchell*, 7 C. B. (N.S.) 55. See Annual Practice, Order 49, r. 8.

properly be attributed to an earlier plaintiff, and allows the second or third action to go on for the additional relief; but such questions can only be discussed in the presence of all parties (*c*).

Where numerous actions (in one case as many as seventy-eight) are brought by different plaintiffs against the same defendants, for alleged fraudulent misrepresentations in respect of the same company, in all of which actions the same question substantially is raised, in some way or other provision will be made, by the consent of the parties, for the trial of the real question between the parties in a single action to be fixed upon as a test action (*d*).

The Court, under the rules of the Supreme Court, 1883, Order 49, r. 8, adopts the old practice at common law, but nevertheless the Court can consolidate actions at the instance of plaintiffs (*e*). But in such cases the Court may, under its general jurisdiction, enlarge the time for taking the next step in several of the series of actions, till one of them has been tried as a test action (*f*).

The jurisdiction of the Court of Bankruptcy to stay proceedings in other Courts is now exercised under the Bankruptcy Act, 1914, which, in section 9, sub-section 1 (replacing section 10, sub-section 2 of the Bankruptcy Act, 1883), enacts that "The Court may at any time after the presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor; and any Court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just." Where the proceedings to be stayed are in a Division of the High Court, the application to stay is properly made to that Division (*g*).

The general rule is that the Court will not restrain proceedings in an action to which the discharge in bankruptcy of the debtor would be no defence (*h*). But pending the bankruptcy execution will not issue on the judgment (*i*). The exercise of the power is in

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(*c*) *M'Henry* v. *Lewis*, 22 Ch. D., at p. 404.

(*d*) *Amos* v. *Chadwick*, 9 Ch. D. 459; *Bennett* v. *Lord Bury*, 5 C. P. D. 339; [1928] An. Pr., p. 867.

(*e*) *Martin* v. *M.*, [1897] 1 Q. B. 429.

(*f*) *Amos* v. *Chadwick*, *supra*; *Holden* v. *Silkstone Co.*, 30 W. R. 98; *Colledge* v. *Pike*, 56 L. T. 124; *Briton, etc., Life Assurance Co.* v. *Jones*, 60 L. T. 637; [1928] An. Pr., p. 867.

(*g*) *Sharp* v. *McHenry*, 55 L. T. 747; see also *Ex p. Hirst*, 11 Ch. D. 278; *Ex p. Bayly*, 15 Ch. D. 223; *Ex p. Harper*, 4 T. L. R. 65.

(*h*) *Ex p. Coker, re Blake*, L. R. 10 Ch. 652.

(*i*) *Cobham* v. *Dalton*, L. R. 10 Ch. 655.

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all cases discretionary (*k*), but the Court will not restrain a secured creditor from exercising his legal remedies (*l*). A committal for non-payment of rates is a punitive proceeding and consequently will not be restrained (*m*). But a sequestration may be (*n*).

4. Power to restrain Proceedings in Foreign Courts.

The High Court may still restrain a person *within its jurisdiction* from instituting, or (if proceedings have been already commenced) from continuing proceedings in Courts out of its jurisdiction, as in foreign countries (properly so called), our colonies, or Ireland or Scotland. It interferes, however, not upon any pretension to control or overrule the decisions of such Courts or to examine judicial and administrative acts abroad, but it acts *in personam*, from the fact of the party on whom the order is made being within the power of the Court, and that the questions to be determined are such as ought to be adjudicated upon in this country (*o*).

When a person sues another for the same matter in two Courts *in this country*, such a proceeding is *prima facie* vexatious, and the Court will generally, as of course, put the plaintiff to his election, and stay one of the suits (*p*). But if one of the actions is *in a foreign country* where there are different forms of procedure and different remedies, there is no such presumption, and the burden lies upon the person seeking to restrain proceedings abroad to show that they are vexatious (*q*). "The general principle is that the Court can and will interfere whenever there is vexation and oppres-

(*k*) *Ex p. Mills*, L. R. 6 Ch. 594, Williams' Bankruptcy (13th ed.), p. 75.

(*l*) *Ex p. Hirst, re Wherly*, 11 Ch. D. 278; *Re Evelyn*, [1894] 2 Q. B. 302; as to actions abroad see *Moor* v. *Anglo-Italian Bank*, 10 C. D. 681; see also *Ex p. Birmingham Gas Co.*, 11 Eq. 615 (distress).

(*m*) *Re Edgcombe*, [1902] 2 K. B. 403; Williams' Bankruptcy (13th ed.), p. 75.

(*n*) *Re Pollard*, [1903] 2 K. B. 41.

(*o*) *Love* v. *Baker*, 1 Ch. Ca. 67, 2 Freem. 125; *Portarlington* v. *Soulby*, 3 My. & K. 104; *Cranstown* v. *Johnston*, 3 V. 170, 182; *Beauchamp* v. *Huntley*, Jac. 546; *Bushby* v. *Munday*, 5 Madd. 297; *Kennedy* v. *Cassillis*, 2 Swans. 313; *Bunbury* v. *B.*, 1 B. 318; *Breadalbane* v. *The Marquis of Chandos*, 2 My. & C. 711, 732; *Venning* v. *Loyd*, 1 De G. F. & J. 193; *London, etc., Bank* v. *Strutton*, 18 W. R. 107; *Ex p. Tait*, 13 Eq. 311; *Armstrong* v. *A.*, [1892] P. 98; *Heilman* v. *Falkenstein*, 33 T. L. R. 383; [1928] An. Pr. 2148, 2154.

(*p*) *M'Henry* v. *Lewis*, 22 Ch. D. 397; *Walsh* v. *Bishop of Lincoln*, L. R. 4 Ad. & E. 242; see also *Mutrie* v. *Binney*, 35 Ch. D. 614; *Jopson* v. *James*, 77 L. J. Ch. 824; *Cohen* v. *Rothfield*, [1919] 1 K. B. 410.

(*q*) *M'Henry* v. *Lewis*, *supra*; *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 225; *Baird* v. *Prescott*, 6 T. L. R. 231; *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B. 141; *Egbert* v. *Short*, [1907] 2 Ch. 205; *Re Norton's Settlement*, [1908] 1 Ch. 471; *Cohen* v. *Rothfield*, [1919] 1 K. B., p. 413.

sion to prevent the administration of justice being perverted for an unjust end " (*r*). Where there are two such actions, the Courts in this country will act in one of three ways—put the party so suing to his election, or, without allowing him to elect, stay all proceedings in this country, or stay all proceedings in the foreign country. The last way is an injunction acting on the party affected and may be inoperative (*s*). The mere co-existence of suits, as stated above, is not vexatious, and consequently the defendant in an English action, in which no decree has been made, will not be prevented from commencing, against the plaintiff in the English action, an action abroad (*t*). In *Cohen* v. *Rothfield* (*u*) two parties who had cross-claims arising out of the same transactions for substantially the same relief commenced proceedings against each other, one instituting an action in England and the other in Scotland. The C. A. (overruling Shearman, J.) refused to restrain the plaintiff in either action, unless satisfied that the continued prosecution of such plaintiff's action would be oppressive or vexatious. It is incumbent on the party seeking to restrain the other to show that the proceeding he complains of is oppressive or vexatious, and that the party instituting it can obtain no advantage therefrom. From the judgments in this case it would appear that the burden of proof is on the applicant who seeks to stay proceedings commenced outside this country whether or not such proceedings are within the King's dominions, but that the burden of proof is heavier where the proceedings are without than where they are within the King's dominions.

But when a foreigner seeks no assistance from the Courts of this country it will require a strong case to restrain him, when domiciled in another country, from proceeding to obtain payment of debts according to the law of that country (*x*).

In *Hope* v. *Carnegie* (*y*), a decree was made in England for the administration of the estate of a testator (domiciled in England)

(*r*) *Per* Bowen, L.J., in *M'Henry* v. *Lewis*, 22 Ch. D., at p. 408; cf. *Ewing* v. *Orr-Ewing*, 10 A. C. 453, and *Logan* v. *Bank of Scotland* (No. 2), [1906] 1 K. B., at pp. 149—151.

(*s*) *Per* Baggallay, L.J., in *The Christiansborg*, 10 P. D. 141, at p. 152.

(*t*) *Hyman* v. *Helm*, 24 Ch. D. 531; and see *per* North, J., in *Mutrie* v. *Binney*, 35 Ch. D., at p. 628.

(*u*) [1919] 1 K. B. 410.

(*x*) *The Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416; *Vardopulo* v. *V.*, 25 T. L. R. 518; *The Hagen*, [1908] P. 189.

(*y*) L. R. 1 Ch. 320; and see as to giving leave to take proceedings abroad, *Batthyany* v. *Walford*, 33 Ch. D. 624, 36 Ch. D. 269; *Wedderburn* v. *W.*, 4 My. & C. 585; Westlake (7th ed.), pp. 136, 227.

Earl of Oxford's Case.

entitled to real and personal estate in England and the Netherlands. Subsequently a defendant, one of his children, instituted proceedings in the Netherlands for the administration both of his real and personal estate in that country. It was held by Turner, L.J., affirming the decision of Stuart, V.-C., that this defendant ought to be restrained from continuing the pending proceedings in the Netherlands, and from commencing any other proceedings in respect of the testator's personal estate in the Netherlands or elsewhere. Knight-Bruce, L.J., thought that the defendant ought to have been left at liberty to carry on the pending proceedings in the Netherlands as to the real estate, if she could do so without proceeding as to the personal estate (*z*).

The rule, which prevents a creditor from proceeding with an action for the recovery of his debt after a decree in an administration suit, is applicable to the case of a creditor proceeding in a foreign Court, and will render him liable to the costs of an application to restrain him after he has received due notice of the judgment (*a*).

Where, however, the Court may not be able to do complete justice in a case—as, for instance, where some of the defendants are domiciled and have real property in a country out of the jurisdiction—the Court may, after a decree, allow proceedings to be taken in such country, the effect of which would be to obtain security for the demand which they might re-establish by the suit in this country (*b*). And upon the same principle the foreign suit has been kept on foot as accessory to the English suit, and as the means of affecting property which the English Court could not touch (*c*).

And where, after obtaining a decree for payment of a demand, the plaintiff takes proceedings in another country for the same demand, in the expectation of obtaining more than the Court here held him to be entitled to, such proceedings will be restrained, and he will be ordered, on receiving payment of what the Court adjudged him to be entitled to, to give up and surrender the securities which he held for such demand (*d*), for upon them, according to the judgment, nothing remains due.

(*z*) See further *post*, p. 648.

(*a*) *Graham* v. *Maxwell*, 1 Mac. & G. 71; see *per* Lord St. Leonards, C., 5 H. L. Cas., p. 455; *Beauchamp* v. *Huntley*, Jac. 546; *Re Low*, [1894] 1 Ch. 157; Westlake (7th ed.), pp. 136, 137.

(*b*) *Wedderburn* v. *W.*, 4 My. & C. 585; and see Westlake (7th ed.), p. 418.

(*c*) *Beckford* v. *Kemble*, 1 S. & S. 7.

(*d*) *Booth* v. *Leycester*, 3 My. & C. 459; Westlake (7th ed.), p. 414.

Earl of Oxford's Case.

" Even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill-calculated to answer the ends of justice, the Court of Chancery has restrained the foreign action, imposing, however, terms which it has considered reasonable for protecting the party who was suing abroad " (*e*).

So when there was no question as to the foreign litigation being or not being necessary, or being or not being likely to be so effectual as litigation in this country, still if a person within the jurisdiction of the Court of Chancery was instituting proceedings in a foreign Court, the instituting of which was contrary to good conscience, the Court, on a bill filed here, restrained the prosecution of such foreign suit just as if it had been a suit in this country (*f*).

But where its interposition would give an unfair advantage to foreign over British creditors, the Court has refused to restrain creditors being British subjects from suing on bonds given to release a ship, which they had proceeded against in Louisiana, although they knew that by the law of that State the rights of the mortgagee, contrary to the comity of nations, would be disregarded (*g*).

And where the matter may be more conveniently litigated in the foreign Court, equity will not interfere (*h*).

So where an incumbrancer on immovable property, situate in a foreign country, has instituted proceedings in that country for the purpose of enforcing his rights, he will not be restrained by injunction from prosecuting such proceedings, even though the mortgagor is a company in the course of winding up in this country—at all events if the party seeking to restrain the incumbrancer can appear before the foreign tribunal and have his rights finally settled (*i*); and the proceedings in our own Courts for the same matter will be stayed pending the result of the litigation in the foreign Court (*k*).

Again, where there is a suit by the same plaintiff as in the

(*e*) *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas., p. 437; *Baillie* v. *B.*, 5 Eq. 175; *Cood* v. *C.*, 33 B. 314; and see *Armstrong* v. *A.*, [1892] P. 98.

(*f*) *Portarlington* v. *Soulby*, 3 My. & K. 104; and see *London, etc., Bank* v. *Strutton*, 18 W. R. 107.

(*g*) *Liverpool Marine Credit Co.* v. *Hunter*, 4 Eq. 62; L. R. 3 Ch. 479; *Re Maudslay, Sons and Field*, [1900] 1 Ch. 602; Westlake, p. 205.

(*h*) *Jones* v. *Geddes*, 1 Ph. 724; *Phosphate Sewage Co.* v. *Molleson*, 1 A. C. 780; *Venning* v. *Loyd*, 1 De G. F. & J. 193.

(*i*) *Moor* v. *Anglo-Italian Bank*, 10 Ch. D. 681.

(*k*) *Elliott* v. *Minto*, 6 Madd. 16; *Venning* v. *Lloyd*, *supra* (*h*); *The Peshawur*, 8 P. D. 33; cf. *Transatlantic Co.* v. *Pietroni*, John. 604.

English Court pending in a foreign Court, which can afford a complete remedy, the proceedings in the English Court may be suspended, and the plaintiff in the English proceedings put to his election in which Court he will proceed (*l*).

And where a plaintiff has commenced an action in a foreign Court, he will not be allowed to proceed with the English until he has abandoned the foreign action (*m*).

The Court will refuse an injunction if it would be ineffectual. Thus when a person sought to be restrained is not within the jurisdiction, it has been held that the Court will refuse the application for want of power (*n*); Lord Cranworth, in *The Carron Iron Co.* v. *Maclaren* (*o*), said, that property within the jurisdiction would enable an injunction to be made effectual against the owner out of it; and, at all events, where the defendants are a foreign corporation (*e.g.*, a limited company) having some of its property within the jurisdiction, an injunction may be made effectual by sequestration (*p*). For the purposes of residence a company may in fact have more than one domicil (*q*).

In a case where judgment had been given for the administration of an estate it was held that the Court had no power to restrain a foreign creditor, even when he had carried in a claim against the estate (which he afterwards withdrew), from proceeding in a foreign Court against the administrator (*r*).

Mere hardship or inconvenience is not sufficient to justify interference with proceedings taken in a foreign Court (*s*); and where a foreigner has appeared to an action in an English Court, the Court has a discretion as to restraining him from litigating the same subject-matter in the Courts of his own country (*t*).

Moreover, before the Court interposes upon an interlocutory

(*l*) *Pieters* v. *Thompson*, G. Coop. 294; *The Mali Ivo*, L. R. 2 A. & E. 356; see also *Von Eckhardstein* v. *V. E.*, 23 T. L. R. 539, 593; *The Mannheim*, [1897] P. 13; Westlake (7th ed.), p. 416.

(*m*) *The Catterina Chiazzare*, 1 P. D. 368; *The Delta*, 25 W. R., at p. 49.

(*n*) *Per* Jessel, M.R., *International Pulp, etc., Co.*, 3 Ch. D., at p. 599; *per* Chitty, J., *Re North Carolina Estate Co.*, 5 T. L. R. 328; *per* Bacon, V.-C., in *Re Chapman*, 15 Eq., at p. 77.

(*o*) 5 H. L. C., at p. 442.

(*p*) *Re Burland's Trade Mark*, 41 Ch. D. 542, 544.

(*q*) Westlake (7th ed.), p. 387.

(*r*) *Re Boyse*, 15 Ch. D. 591; and see *Carron Iron Co.* v. *Maclaren*, 5 H. L. Cas. 416, *supra;* see Seton (7th ed.), pp. 721 *et seq.*

(*s*) *Fletcher* v. *Rodgers*, 27 W. R. 97.

(*t*) *Dawkins* v. *Simonetti*, 29 W. R. 228; and see *Re Boyse*, *supra; M'Henry* v. *Lewis*, 22 Ch. D. 397; *Peruvian Guano Co.* v. *Bockwoldt*, 23 Ch. D. 225; *Baird* v. *Prescott*, 6 T. L. R. 231; *Armstrong* v. *A.*, [1892] P. 98.

application to stay proceedings in a suit by reason of a decree or judgment in a foreign country, it must be satisfied that the foreign decree or judgment does justice and covers the whole subject of the suit and that effectual relief can be obtained in the foreign country (*u*).

The result of the authorities is that, if the circumstances are such as would make it the duty of the Court to restrain a party from instituting proceedings in this country, they will also warrant it in restraining proceedings in a foreign Court. But though the authorities will justify such a course, yet they will not, it seems, make it the duty of the Court so to act, if from any cause it appears likely to be more conducive to substantial justice that the foreign proceedings should take their own course (*x*).

The Courts cannot interfere where relief is sought in consequence of errors and irregularities in the decree of a colonial equitable Court, as an appeal lies from that Court to the appellate jurisdiction in this kingdom (*y*). It is stated by a learned author (*z*) that "the judgment of the competent Court of an ordinary European or American State, cannot be questioned in England for error either in fact or in law."

5. Power to restrain Applications for Acts of Parliament.

It has been laid down by many eminent Judges that the Court of Chancery acting *in personam* had power in a proper case to grant an injunction against a party applying to Parliament for a private Act, or an Act respecting property, in breach of an agreement; but no such injunction has, it seems, yet been granted, nor has any Judge yet ventured to say in what particular case such an injunction will be granted (*a*). An injunction has been granted restraining a company from proceeding with a scheme which required Parliamentary sanction to become operative, and which scheme, if

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(*u*) *Ostell* v. *Lepage*, 2 De G. M. & G. 892; *Kennedy* v. *Cassillis*, 2 Swans. 313; *Wilson* v. *Ferrand*, 13 Eq. 362; Westlake (7th ed.), pp. 415, 416.

(*x*) See *per* Cranworth, C., in *The Carron Iron Co.* v. *Maclaren*, *supra;* and see *Hope* v. *Carnegie*, L. R. 1 Ch. 320.

(*y*) See *Henderson* v. *H.*, 3 Ha. 100; and *Mutrie* v. *Binney*, 35 Ch. D. 614.

(*z*) Westlake (7th ed.), p. 410.

(*a*) See *Heathcote* v. *N. Staffs. Ry. Co.*, 2 M. & G. 100; *Att.-Gen.* v. *Man. & Leeds Ry. Co.*, 1 Rly. Cas. 430; *Lancaster & Carlisle Ry. Co.* v. *N. W. Ry. Co.*, 2 Kay & J. 293; *Steele* v. *N. M. Ry. Co.*, L. R. 2 Ch. 237; *Re L. C. & D. Ry. Arrangement Act, ex p. Hartridge*, L. R. 5 Ch. 671, 682. See also *Bill* v. *The Sierra Nevada, etc., Co.*, 1 De G. F. & J. 177, in which case the application sought to be restrained was to a foreign legislature.

carried out, would be in breach of a stipulation affecting the property (*b*).

If, however, it is unlawful and in fact a breach of trust to apply the funds of a company in an application to Parliament for powers to extend the business of the company beyond the objects for which it was constituted, the Court will interfere by injunction at the suit of any of the shareholders (*c*).

(*b*) *Telford* v. *The Met. Board of Works*, 13 Eq. 574.

(*c*) *Simpson* v. *Denison*, 10 Ha. 51; *G. W. Ry. Co.* v. *Rushout*, 5 De G. & Sm. 290; *Cunliff* v. *Manchester, etc., Canal Co.*, 2 Russ. & My. 480 (n.); *Ward* v. *The Society of Attornies*, 1 Coll. 370; *Hunt* v. *The Shrewsbury, etc., Ry. Co.*, 13 B. 1. But see *Ware* v. *The Grand Junction Waterworks Co.*, 2 Russ. & My. 470; *Vance* v. *East Lancs. Ry. Co.*, 3 K. & J. 50.

PENN *v.* LORD BALTIMORE.

1750. 1 Ves. Sen. 444 (see also Ridg. Ca. t. Hardw. 332).

Power of Court of Equity over Property out of its Jurisdiction by a Decree in Personam.

Specific performance decreed of articles executed in England, concerning boundaries of two provinces in America.

The bill was founded on articles entered into between the plaintiffs and defendant, May 10, 1732, which articles recited several matters as introductory to the stipulation between the parties, and particularly letters patent, granted June 20, 2 Car. 1, by which the district, property, and Government of Maryland, under certain restrictions, is granted to the defendant's ancestor, his heirs and assigns; farther, reciting charters or letters patent in 1681, by which the province of Pennsylvania is granted to Mr. William Penn and his heirs; and stating a title to the plaintiffs, derived from James, Duke of York, to the three lower counties, by two feoffments, both bearing date August 24, 1682. The articles recite that several controversies had been between the parties, concerning the boundaries and limits of these two provinces and three lower counties; and make a particular provision for settling them, by drawing part of a circle about the town of Newcastle; and a line to ascertain the boundaries between Maryland and the three lower counties; and a provision in what manner that circle and line should run and be drawn; and that commissioners should do it in a certain limited time, the final time for which was on or before December 25, 1733. There was, beside, a provision in the articles, that if there should be a want of a quorum of commissioners meeting at any time, the party by default of whose commissioners the articles could not be carried into execution, should forfeit the penalty of £5,000 to the other party; and a provision for making conveyances of the several

parts from one to the other in these boundaries, and for enjoyment of the tenants and landholders.

The bill was for a specific performance and execution of the articles; what else was in the cause, came by way of argument to support, or objection to impeach, this relief prayed.

When the cause came on before, it was ordered to stand over, that the Attorney-General should be made a party (*a*); who now left it to the Court to make a decree, so as not to prejudice the right of the Crown.

Many objections were raised on behalf of the defendant, the first objection being that this Court has not jurisdiction nor ought to take cognisance of it, for that the jurisdiction is in the King in Council.

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Thirdly, this agreement ought not to be carried into execution by this Court, as it affects the estates, rights, and privileges of the planters, tenants, and inhabitants within the district, and the tenure and law by which they live, without their consent.

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Eighthly, this Court cannot make an effectual decree in the cause, nor enforce the execution of their own judgment.

Lord Chancellor [Hardwicke].—I directed this cause to stand over for judgment, not so much from any doubt of what was the justice of the case, as by reason of the nature of it, the great consequence and importance, and the great labour and ability of the argument on both sides, it being for the determination of the right and boundaries of two great provincial governments and three counties; of a nature worthy the judicature of a Roman senate rather than of a single Judge; and my consolation is, that if I should err in my judgment, there is a judicature, equal in dignity to a Roman senate, that will correct it.

It is unnecessary to state the case on all the particular circumstances of evidence, which will fall in more naturally, and very intelligibly, under the particular points arising in the case.

(*a*) See Ridg. Ca. t. Hardw. 332.

The relief prayed must be admitted to be the common and ordinary equity dispensed by this Court, the specific performance of agreements being one of the great heads of the Court, and the most useful one, and better than damages at law, so far as relates to the thing *in specie*, and more useful in a case of this nature than in most others, because no damages in an action of covenant could be at all adequate to what is intended by the parties, and to the utility to arise from this agreement, *viz.*, the settling and fixing these boundaries in peace, to prevent the disorder and mischief which, in remote countries distant from the seat of government, are most likely to happen and most mischievous. Therefore, the remedy prayed by a specific performance is more necessary here than in other cases, provided it is proper in other respects; and the relief sought must prevail, unless sufficient objections are shown by defendant, who has made many and various for that purpose.

First, the point of jurisdiction ought in order to be considered, and, though it comes late, I am not unwilling to consider it. To be sure, a plea to the jurisdiction must be offered in the first instance, and put in *primo die*; and answering submits to the jurisdiction, much more when there is a proceeding to hearing on the merits, which could be conclusive at common law; yet a Court of equity, which can exercise a more liberal discretion than common law Courts, if a plain defect of jurisdiction appears at the hearing, will no more make a decree than where a plain want of equity appears.

It is certain that the original jurisdiction, in cases of this kind relating to boundaries between provinces, the dominion, and proprietary government, is in the King and Council; and it is rightly compared to the cases of the ancient commotes and lordships marches in Wales; in which, if a dispute is between private parties, it must be tried in the commotes or lordships; but in those disputes, where neither has jurisdiction over the other, it must be tried by the King and Council; and the King is to judge, though he might be a party, this question often arising between the Crown and one lord proprietor of a province in America. So, in the case of the marches, it must be determined in the King's Court, who is never considered as partial

in these cases, it being the judgment of his Judges in B. R. and Chancery. So, where before the King and Council, the King is to judge, and is no more to be presumed partial in one case than in the other. *This Court, therefore, has no original jurisdiction on the direct question of the original right of the boundaries; and this bill does not stand in need of that. It is founded on articles executed in England under seal, for mutual considerations, which gives jurisdiction to the King's Courts, both of law and in equity, whatever be the subject-matter.* An action of covenant could be brought in B. R. or C. B., if either side committed a breach; so might there be for the £5,000 penalty, without going to the Council.

There are several cases wherein collaterally, and by *reason of the contract of the parties*, matters out of the jurisdiction of the Court originally, will be brought within it. Suppose an order by the King and Council in a cause wherein the King and Council had original jurisdiction, and the parties enter into an agreement under hand and seal for performance thereof,—a bill must be in this Court for a specific performance, and, perhaps, it will appear this is almost literally that case. The reason is, because none but a Court of equity can decree that. The King in Council is the proper judge of the original right; and if the agreement was fairly entered into and signed, the King in Council might look on that, and allow it as evidence of the original right; but if that agreement is disputed, it is impossible for the King in Council to decree it as an agreement. The Court cannot decree *in personam* in England, unless in certain criminal matters, being restrained therefrom by statute (*b*) and, therefore, the Lords of the Council have remitted this matter very properly to be determined in another place, on the foot of the contract. *The conscience of the party was bound by this agreement; and, being within the jurisdiction of this Court, which acts* in personam, *the Court may properly decree it as an agreement, if a foundation for it.* To go a step farther, as this Court collaterally, and in consequence of the agreement, judges concerning matters not originally in its jurisdiction, it would decree a performance of

(*b*) 16 Car. 1, c. 10.

articles of agreement to perform a sentence in the Ecclesiastical Court, just as the Court of law would maintain an action for damages in breach of covenant.

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As to the third objection: The tenure of the planters, etc., remains just the same as before, and is preserved by this agreement. The proprietors could not prejudice them by their agreement; but if they could, care is taken by the agreement to preserve them. The King of England is still their sovereign and supreme lord; both charters require the law of the respective provinces should be conformable to the law of England, as near as could be. Consider to what this objection goes: in lower instances, in the case of manors and honours in England, which have different customs and bye-laws frequently, yet, though different, the boundaries of these manors may be settled in suits between the lords of these manors, without making the tenants parties; or may be settled by agreement, which this Court will decree, without making the tenants parties, though in case of fraud, collusion, or prejudice to the tenants, they will not be bound; but notwithstanding, it is binding on the parties, and to be established as to them.

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As to the Court's not enforcing the execution of their judgment, if they could not at all, I agree it would be vain to make a decree; and that the Court cannot enforce their own decree *in rem* in the present case. But that is not an objection against making a decree in the cause; for the strict primary decree in this Court, as a Court of equity, is *in personam*, long before it was settled whether this Court could issue to put into possession in a suit of lands in England, which was first begun and settled in the time of James I, but ever since done by injunction or writ of *assistant* [*sic*] (*c*) to the sheriff; but the Court cannot to this day, as to lands in Ireland or the plantations. In Lord King's time, in the case of *Richardson* v. *Hamilton, Attorney-General of Pennsylvania*, which was a suit of land and a house in the town of Philadelphia, the Court made a decree, though it

(*c*) As to writ of assistance, see *Dove* v. *D.*, Dick. 617.

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could not be enforced *in rem*. In the case of Lord Anglesey, of land lying in Ireland, I decreed for distinguishing and settling the parts of the estate, though impossible to enforce that decree *in rem*; but the party being in England, I could enforce it by process of contempt *in personam* and sequestration, which is the proper jurisdiction of this Court. And, indeed, in the present case, if *the parties want more to be done, they must resort to another jurisdiction*; and it looks, by the order in 1735, as if that was in view, liberty being thereby given to resort to that Board.

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I am of opinion, therefore, to decree a specific performance of this agreement, without prejudice to any right, etc., of the Crown.

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His Lordship, having directed that the plaintiffs and defendant should quietly hold according to the articles, altered that; for it would be improper to have a decree in this Court for quiet enjoyment of lands in America; which would occasion continual applications to this Court for contempts, etc., and that it ought to be the proper jurisdiction.

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NOTES.

1. Generally.
2. Necessity for some equity to give jurisdiction, p. 645.
3. The *lex situs* must be considered, p. 652.

1. Generally.

In the *British South Africa Co.* v. *Campanhia de Moçambique* (*d*) it was decided by the House of Lords that the rules of procedure under the Judicature Acts abolishing local venue (*e*) have given no new jurisdiction with respect to "*local*" actions relating to land abroad, and that, apart from cases of contract or equity such as that in the principal case, the English Courts have no jurisdiction

(*d*) [1893] A. C. 602; see also *Black Point Syndicate* v. *Eastern Concessions*, 79 L. T. 658.

(*e*) R. S. C., Order 36, r. 1.

to entertain any local action relating to land abroad, such as an action for damages for trespass. Lord Herschell explained (*f*) the distinction between transitory and "local" actions to be "those in which the facts relied on as the foundation of the plaintiff's case have no necessary connection with the particular locality and those in which there is such a connection." The jurisdiction, therefore, of the High Court remains in substance the same as that of the old Court of Chancery when the principal case was decided, and Lord Hardwicke there lays down the principle that equity, as it acts primarily *in personam*, and not merely *in rem*, may, where a person against whom relief is sought *is within the jurisdiction*, make a decree upon the ground of a contract or some equity subsisting between the parties respecting immovables situated out of the jurisdiction; but while he enforces the right of the Court in proper cases to act *in personam*, he recognises the principle that the *lex situs* must be resorted to in order to put the plaintiff into possession. It was said by Wright, J. (*g*): "Courts of equity have, from the time of Lord Hardwicke's decision in *Penn* v. *Lord Baltimore*, exercised jurisdiction *in personam* with respect to foreign land against persons locally within the jurisdiction of the English Court *in cases of contract, fraud, and trust*, enforcing their jurisdiction by writs of *ne exeat regno* during the hearing and by sequestration, commitment, or other personal process after decree."

The exercise of this jurisdiction is therefore subject to certain limitations: First, there must be some equity against the defendant affecting the land in local actions. As regards mere personal or transitory actions, the Courts of common law have entertained them where a defendant is within the jurisdiction, although the cause of action arose out of the jurisdiction, on the ground, as stated by Wright, J. (*h*), quoting De Grey, C.J., that "personal injuries are of a transitory nature and *sequuntur forum rei*."

The second limitation is, that as the Court can only enforce its order indirectly in manner above stated in order to put the plaintiff in possession, the jurisdiction of the *lex situs* must be invoked.

The third limitation, which seems to follow as a corollary to the second, is, that though the Court, in deciding on the equity, acts

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(*f*) [1893] A. C., at p. 618.

(*g*) *British South Africa Co.* v. *Companhia de Moçambique*, [1892] 2 Q. B. 358, at p. 364; [1893] A. C. 602; and see *Deschamps* v. *Miller*, [1908] 1 Ch. 856; cf. *British Controlled Oilfields, Ltd.* v. *Stagg*, 127 L. T. 209.

(*h*) [1892] 2 Q. B., p. 363.

on its own rules, it will not enforce a judgment where it is illegal or impossible, according to the *lex situs*, to give the plaintiffs possession.

2. Necessity for some Equity to give Jurisdiction.

Lord Hardwicke, in the principal case, says: "This Court therefore has no original jurisdiction on the direct question of the original right of the boundaries, and this bill does not stand in need of that. It is founded on articles executed in England under seal, for mutual considerations, which gives jurisdiction to the King's Courts, both of law and in equity, whatever be the subject-matter." The law is stated by Parker, J., in *Deschamps* v. *Miller* (*i*), as follows: "In my opinion the general rule is that the Court will not adjudicate on questions relating to the possession of immovable property out of the jurisdiction. There are, no doubt, exceptions to the rule, but without attempting to give an exhaustive statement of those exceptions, I think it will be found that they all depend on the existence between the parties of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a Court of equity in this country, would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property. . . . Where there is no contract, no fiduciary relationship, and no fraud or other unconscionable conduct giving rise to a personal obligation, and the whole question is whether or not, according to the law of the locus the claim of title set up by one party would be preferred to the claim of another party, I do not think the Court ought to entertain jurisdiction."

In *Lord Cranstown* v. *Johnston* (*k*), a creditor having obtained a judgment in one of the West Indian Islands (St. Christopher's) against his debtor, then absent from the island, and having purchased his debtor's real estate situate there, on his own execution, was ordered to reconvey to the debtor on payment of the debt, costs of the proceedings in St. Christopher's, and interest. There is no distinction between lands in a colony or a foreign country with respect to the exercise of this jurisdiction (*l*).

Specific Performance.—At a very early date specific performance

(*i*) [1908] 1 Ch., p. 863.
(*k*) 3 V. 170.
(*l*) *Angus* v. *A.*, West temp. Hardwicke, 23.

of a contract for sale of lands out of the jurisdiction was enforced. Thus, in *Archer* v. *Preston* (*m*), a contract was entered into for the sale of land in Ireland, and the defendant, who refused to carry out the contract, coming over to England, a bill was filed against him in Chancery and a *ne exeat regno* granted, and when he departed for Ireland without answering, he was sent for by special order and made to answer for the contempt.

In the *Black Point Syndicate, Ltd.* v. *Eastern Concessions, Ltd.* (*n*), the defendants granted a lease of the mining rights in lands in Milos to the plaintiffs, and, in consequence of certain claims paramount to the defendants' title, the plaintiffs refused to pay the royalties due, whereupon the defendants took possession of the mines. On an application for an interlocutory injunction, restraining the defendants from keeping possession, Stirling, J., refused to grant it under the circumstances, holding that the relief asked for was specific performance of an implied covenant for quiet enjoyment of lands abroad (*o*).

Foreclosure and Redemption.—Bills have been entertained for the foreclosure or redemption of mortgages of property out of the jurisdiction. In *Toller* v. *Carteret* (*p*), a bill was filed by the mortgagee for foreclosure of the Island of Sark; and in *Paget* v. *Ede* (*q*) foreclosure was decreed of lands in the West Indies, the Judge treating the case of foreclosure as merely extinguishing a right to redeem and enforcing a personal contract (*r*).

As to redemption of mortgages, in *Beckford* v. *Kemble* (*s*), the Court had granted a decree for redemption, of a mortgage of West India lands. Then the defendants commenced foreclosure proceedings in the Court of the Colony; the Court here granted an injunction to restrain the defendants from foreclosing in the foreign Courts, holding that the plaintiff had a clear equity to be protected against a double account, all parties being in England at the time.

Fraud.—In cases of constructive trust, where lands abroad have been acquired by fraud, the transaction has been set aside, and the defendant ordered to execute the necessary reconveyances (*t*).

(*m*) 1 Eq. Ca. Abr., p. 133, pl. 3; *Jackson* v. *Petrie*, 10 V. 164, and see *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132; Fry (6th ed.), p. 57.

(*n*) 79 L. T. 658. (*o*) See *Penn* v. *Baltimore*, 1 Ves. Sen., at p. 455.

(*p*) 2 Vern. 494. (*q*) 18 Eq. 118.

(*r*) See *per* Kay, J., in *Re Hawthorne*, 23 Ch. D., at p. 748.

(*s*) 1 Si. & St. 7; *Bent* v. *Young*, 9 Si. 180, at p. 190. And see Westlake (7th ed.), p. 228.

(*t*) *Ardglasse* v. *Muschamp*, 1 Vern. 75; *Lord Cranstown* v. *Johnston*, 3 V. 170; *Jackson* v. *Petrie*, 10 V. 164; *Deschamps* v. *Miller*, [1908] 1 Ch., pp. 863, 864.

Penn v. Lord Baltimore.

Waste.—And a tenant in common of lands abroad, resident here, was held liable to an account for waste committed (*u*), and also for an account of rents and profits (*x*).

Partnership and Companies.—So likewise on a bill filed by one of the parties in England, a decree has been made for winding up a partnership in Hayti, and taking accounts of agency transactions between the partnership and a Liverpool firm (*y*).

The residence and domicil of an incorporated company are determined by the situation of its principal place of business. The jurisdiction of the Courts of one country over companies domiciled in another country appears to depend on the answer to the question whether these companies are, through their property or their agents, amenable to the process of the Courts in which the companies are sued (*z*).

A joint stock company formed in India, and incorporated by registration under Indian law, and having its principal place of business in India, with an agent and a branch office in England, may be wound up under the Companies (Consolidation) Act, 1908 (*a*).

A company which has not a registered office in England, but has carried on business here (*b*) may be wound up under the Companies (Consolidation) Act, 1908. Where, however, a company has no office (registered or unregistered) and no assets in this country, but carries on business here by agents, it cannot be wound up in this country (*c*).

Receivers have been appointed (*d*), not only in foreign countries, but also in our colonies.

Administration.—In *Ewing* v. *Orr-Ewing* (*e*) a testator domiciled

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(*u*) *Carteret* v. *Petty*, 2 Swans. 323 (n.); cf. *Batthyany* v. *Walford*, 33 Ch. D. 624; 36 Ch. D. 269.

(*x*) *Roberdeau* v. *Rous*, 1 Atk. 543.

(*y*) *Maunder* v. *Lloyd*, 2 John. & H. 718; *Hendrick* v. *Wood*, 9 W. R. 588.

(*z*) See Lindley, Companies (6th ed.), 1221 *et seq;* Westlake (7th ed.), pp. 381—3.

(*a*) See *Re Commercial Bank of India*, 6 Eq. 517; *Re Matheson Bros., Ltd.*, 27 Ch. D. 225; Buckley (10th ed.), p. 554.

(*b*) See *Re Mercantile Bank of Australia*, [1892] 2 Ch. 204; *Re Syria Ottoman Ry. Co.*, 20 T. L. R. 217.

(*c*) *Re Lloyd Generale Italiano*, 29 Ch. D. 219; Westlake (7th ed.), p. 175; Buckley (10th ed.), p. 554.

(*d*) *Sheppard* v. *Oxenford*, 1 K. & J. 500; *Bunbury* v. *B.*, 1 B., p. 336; *Houlditch* v. *Lord Donegal*, 8 Bli. (N.S.) 301, 343; *Re Maudslay*, [1900] 1 Ch. 602; *Duder* v. *Amsterdamsch, etc.*, [1902] 2 Ch. 132; Seton (7th ed.), p. 779.

(*e*) 9 A. C. 34, disapproving the *dicta* of Lord Westbury in *Enohin* v. *Wylie*, 10 H. L. Ca. 1, at p. 13.

in Scotland, and possessed of a large personal and some heritable property in Scotland, and of a comparatively small personal property in England, by will made in Scotch form, appointed several persons to be executors and trustees, *some of whom resided in England*, and some in Scotland. The trustees obtained a confirmation of the will in Scotland, and the confirmation was sealed by the English Court of Probate, which sealing, under 21 & 22 Vict. c. 50, has the same effect as if probate had been granted by the English Court. An *infant, resident in England*, brought by his next friend an action here to administer the estate, and the writ was served upon some of the trustees in England, and (under an order) upon the Scotch trustees in Scotland. The trustees appeared without protest, and took no steps to discharge the order. They removed practically all the English personalty into Scotland before the action came on for trial. It was held by the House of Lords that the English Court had jurisdiction to administer the trusts of the will as to the whole of the estate, both Scotch and English; and that as no proceedings were pending in a Scotch Court (if such were possible), by which the interests of the infant plaintiff could have been equally protected, the jurisdiction was not discretionary, but that the decree was as a matter of course (*f*).

"The Courts of Equity in England," said Lord Selborne (*g*), "are, and always have been, Courts of conscience, operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land in Scotland, in Ireland, in the Colonies, in foreign countries. A jurisdiction against trustees which is not excluded *ratione legis rei sitæ* as to land, cannot be excluded as to moveables because the author of the trust may have had a foreign domicil; and for this purpose it makes no difference whether the trust is constituted *inter vivos*, or by a will, or *mortis causa* deed. Accordingly, it has always been the practice of the Court of Chancery to administer, as against executors and trustees personally subject to its jurisdiction, the whole personal estate of

(*f*) See also *Stirling-Maxwell* v. *Cartwright*, 11 Ch. D. 523; *Johnstone* v. *Beattie*, 10 Cl. & Fin. 42, 84.

(*g*) 9 A. C., pp. 40, 41. Notwithstanding the decision in this case, the administration of the testator's estate was in fact carried out in Scotland, under the circumstances stated in 10 A. C. 453. But the statement of the law by Lord Selborne, set out above in the text, remains unaffected.

testators or intestates who have died domiciled abroad. . . . If English trustees, having in their hands English trust funds, were found within the jurisdiction of the Scottish Courts, those Courts, upon the same principle, might compel them to do their duty."

In *Ewing* v. *Orr-Ewing* (*h*), and *Stirling-Maxwell* v. *Cartwright* (*i*), it was treated as obligatory on the Court to administer the trusts of the will as to the whole estate both Scotch and English, at any rate where no proceedings were pending in the *forum loci* in which relief could be obtained. The difficulty, however, where the exercise of such jurisdiction would be inconvenient, as was the case in *Ewing* v. *Orr-Ewing*, is now removed by R. S. C. 1883, Order 55, r. 10, which is as follows :—

" It shall not be obligatory on the Court or Judge to pronounce or make a judgment or order, whether on summons, or otherwise, for the administration of any trust or of the estate of any deceased person, if the questions between the parties can be properly determined without such judgment or order "; and the Court may order a limited administration only, that is, to direct particular accounts and inquiries (*k*).

In *Re Lorillard* (*l*), a testator, domiciled in New York, left assets and debts both in England and America. Administration proceedings were taken in both countries. In the English administration there was a surplus after payment of debts. In the American administration the assets were exhausted, leaving certain creditors unpaid, whose debts were statute-barred by English law but were not barred by the law of New York. The American administrator issued a summons asking that the surplus in the hands of the English executor might be paid to the administrator in America. The application was refused by Eve, J., who made an order allowing a further period of two months for creditors in America to make a claim in the English administration, failing which the surplus assets would be dealt with as assets free for distribution among the beneficiaries in accordance with the law of the domicil (the State of New York). This order was confirmed on appeal.

In the exercise of jurisdiction relating to land abroad, the *lex loci* must be regarded, and in cases where the *lex loci* does not

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(*h*) 9 A. C. 34.

(*i*) 11 Ch. D. 523.

(*k*) *Re Blake*, 29 Ch. D. 913. See also *Re Wilson*, 28 Ch. D. 457; *Re Gyhon*, 29 Ch. D. 834; and *Re Doetch*, W. N. (96) 82.

(*l*) [1922] 2 Ch. 638.

recognise trusts, and there is no equity against a defendant arising from, or as from, his own contract or tort (although the property, if it were situate in this country, would be subject to a trust), the rights given by the *lex loci* may override the trust (*m*). In *Nelson* v. *Bridport* (*n*), Lord Nelson by his will attempted to create successive limitations of his estate of Bronté, in Sicily, by imposing a trust on his brother and the trustees to whom it was devised. It was held that his brother as one of the trustees of the will was bound to do all that he could to perform the trusts so far as the law of Sicily allowed him to do so, and would be answerable to the Court for any wilful neglect or violation of duty, but that as the *lex loci* only recognised absolute ownership, he, on admission, according to the *lex loci*, was absolute owner free from the trusts.

In *Martin* v. *M.* (*o*), an application was made to an English Court to establish a settlement, which had been made in English form, of a moiety of a plantation in Demerara, the wife's property. The husband and wife had subsequently given to persons, with notice of the English settlement, a mortgage of the lands duly executed according to the *lex loci*. It appeared that by that law the settlement was a nullity, and the mortgagee's title notwithstanding the notice, was good. The application was on this ground refused, the Court observing that the equity of the wife was therefore not to be attached to the estate but to the person of the husband. It would seem that the Court would have exercised its jurisdiction *in personam* against the husband, had it been invited, to make him give compensation for the loss to the trust.

In *Harrison* v. *Gurney* (*p*), a decree had been made in 1816 for the execution of trusts of a creditor's deed, including lands in Ireland, of which lands a receiver had been appointed, and an injunction was granted by Lord Eldon to restrain the trustees from proceeding in Ireland for execution of trusts of the same deed.

In *Clarke* v. *Ormonde* (*q*), bills were entertained for execution of the trusts of a will including real and personal estate in Ireland, and a creditor's action for administration of the estate. A receiver was appointed of the estates in Ireland.

(*m*) Westlake (7th ed.), pp. 225, 229; Lewin (12th ed.), pp. 50, 51.

(*n*) 8 B. 547; and see *Glover* v. *Strothoff*, 2 Bro. C. C. 33; *Godfray* v. *G.*, 12 Jur. (N.S.) 397; *Re Piercy*, [1895] 1 Ch. 83; *Re Berchtold*, [1923] 1 Ch. 192.

(*o*) 2 Russ. & M. 507.

(*p*) 2 J. & W. 563.

(*q*) Jac. 108; and see *Jenny* v. *M'Intosh*, 33 Ch. D. 595; *Duder* v. *Amsterdamsch*, [1902] 2 Ch. 132.

Penn v. Lord Baltimore.

Money trusts for charities.—It has been said that the Courts will not administer the trusts of a charity abroad, but the Court will entertain an action with respect to such trusts so far as to secure the fund, and give directions to the trustees. In *Provost of Edinburgh* v. *Aubrey* (*r*), there was a bequest of personal estate on charitable trusts to be administered out of the jurisdiction. Lord Hardwicke said he could not give any directions as to the distribution of money belonging to another jurisdiction. The decree declared that the trust ought to be carried into execution except as to the power to lay out the property in lands in England, and that the property should be transferred to such persons, etc., as the provost should appoint (*s*).

In *Att.-Gen.* v. *Sturge* (*t*), there was a gift of personal estate for the purpose of a school at Genoa. The M.R. said that he had "no doubt that the Attorney-General has jurisdiction to institute proceedings to secure a legacy given for charitable purposes by a subject of the Crown, whether in or out of this country, but not to see a foreign charity administered. Unless the testatrix has so directed, the Court itself has not the means of administering a charity abroad. It appears to me, therefore, I ought to direct the money to be paid in such manner as will secure the intentions of the testatrix respecting the school being carried into effect, as directed by her will, unless it is controlled or modified by the law of the country." Ultimately a reference was directed to chambers, and the Chief Clerk certified that the fund ought to be carried to an account to be intituled "The account of the legacy," etc., "for the support of a school at Genoa"; and that the dividends should from time to time be paid to the Chaplain of Genoa, etc., and that he should transmit accounts to the Judge. And on further consideration the scheme was ordered to be carried into effect.

In *Re Fraser* (*u*), where the trusts were for the benefit of the blind in Inverness-shire, liberty was given to the Attorney-General to apply to the Scotch Court for settlement of a scheme.

Trusts where lex loci will recognise them.—The result of the cases appears to be that in an action for administration, so far as

(*r*) Amb. 236.

(*s*) See also *Att.-Gen.* v. *Lepine*, 2 Sw. 181; *Minet* v. *Vulliamy*, 1 Russ. 113 (n.); *Emery* v. *Hill*, 1 Russ. 112.

(*t*) 19 B. 597; *Re Geck*, 69 L. T. 819; Tyssen, Charitable Bequests, pp. 171 *et seq.*

(*u*) 22 Ch. D. 827; see also *Forbes* v. *F.*, 18 B. 552.

necessary for the purpose of administration and payment of creditors, the Court will exercise its jurisdiction *in personam* against executors and trustees within the jurisdiction so far as regards all property within or out of the jurisdiction which can be made available by the *lex loci*, but that, where the trust is to be administered out of the jurisdiction or in the case of land it is situated out of the jurisdiction, the Court will, on the ground of convenience, allow or direct the trust to be executed by the Court within whose jurisdiction the property is situate, or the trust is to be administered.

Refusal to Exercise Jurisdiction.—In *Norris* v. *Chambres* (*x*), a claim for lien on mines in Prussia for an equitable money demand was refused because there was no privity of contract or obligation existing between the plaintiff and defendant. The M.R. said (*y*), "On examining them" (the cases) "I find that in all of them a privity existed between the plaintiff and defendant; they had entered into some contract, or some personal obligation had been incurred moving directly from the one to the other."

So the Court will not direct an issue to try the validity of a will of lands out of the jurisdiction (*z*). The Court has also refused to entertain a suit for partition of lands out of the jurisdiction (*a*).

In *Re Hawthorne* (*b*), Kay, J., refused to entertain jurisdiction in a dispute between two persons with respect to lands in Saxony, on the ground that there was no contract or equity between the parties but merely a question of title.

3. The Lex Situs must be Considered.

Though the Court makes no decree as to the possession of the land in a foreign country, but only a decree *in personam* against the defendant, yet the Court has regard to the law of the foreign country to see if it be possible that the decree would be obeyed.

In *Ex p. Pollard* (*c*), where the Court compelled a defendant to give effect to an equitable mortgage on lands in Scotland, the Scotch

(*x*) 29 B. 246; 3 De G. F. & J. 583.

(*y*) 29 B. 254; see, too, *Matthaei* v. *Galitzin*, 18 Eq. 340; *Deschamps* v. *Miller*, [1908] 1 Ch. 856, 864.

(*z*) *Pike* v. *Hoare*, 2 Eden, 182.

(*a*) *Cartwright* v. *Pettus*, 2 Ch. Ca. 214.

(*b*) 23 Ch. D. 748; *B. S. A. Co.* v. *Companhia de Moçambique*, [1893] A. C. 602; see also *Matthaei* v. *Galitzin*, 18 Eq. 340; *Whitaker* v. *Forbes*, L. R. 10 C. P. 583; 1 C. P. D. 51; *Reiner* v. *Salisbury*, 2 Ch. D. 378; *Deschamps* v. *Miller*, [1908] 1 Ch. 856.

(*c*) Mont. & Ch. 239; *British South Africa Co.* v. *De Beers Consolidated Mines*, [1910] 2 Ch. 502; *Re Smith*, [1916] 2 Ch. 206; Westlake (7th ed.), p. 225.

law not recognising such a charge, but there being nothing in the law or circumstances to prevent the defendant carrying out the decree, Lord Cottenham, in his judgment (*d*), said : " If the law of the country where the land is situate should not permit or not enable the defendant to do what the Court would otherwise think right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment, the Courts of this country, in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effects of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities. . . . In giving effect to the security, I act upon the well-known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order to be done what the parties may by that law lawfully perform."

In other cases relief has been refused because a title had been acquired by third persons, under the *lex loci*, which prevented the defendant from carrying out the order.

In *Norton* v. *Florence, etc., Co.* (*e*), an English company, having house property at Florence, raised money on bonds expressed to be binding on "all their estate." Subsequently, by a mortgage in Italian form registered in Florence, the same company mortgaged the Florence property to a bank, which had notice of the bonds. The bank took proceedings in Florence to realise their security. It was held that, assuming the bonds to create a charge, nevertheless, not being registered, they did not, according to the *lex loci*, bind the property; and the bank, notwithstanding notice, took the title free from the bonds.

In *The Mercantile, etc., Co.* v. *River Plate, etc., Co.* (*f*), land in Mexico was assigned by an American company to the defendants, an English company, expressly subject to a charge for debentures of the American company. The defendant company, by registration in Mexico, obtained a title, by the *lex loci*, free from a charge for the debentures. North, J., held that the English company and its directors were accountable in an English Court to the debenture-holders for proceeds of such land come to their hands, but the learned Judge refused to appoint a receiver, as there would be

(*d*) At p. 250.
(*e*) 7 Ch. D. 332.
(*f*) [1892] 2 Ch. 303.

"such difficulties in the way of the receiver doing anything when appointed."

In *Waterhouse* v. *Stansfield* (*g*), relief was refused to the plaintiff in respect of an assignment, by way of security of the assignee's interest, under a contract for the purchase of land in Demerara, to secure monies lent. The Vice-Chancellor (*h*) said: "When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitæ*." If the *lex loci* is merely silent, and no further title has been acquired by a third person, the Court will not refuse a decree (*i*).

In *Re Berchtold* (*k*), a testator, and a beneficiary under his will, were both domiciled abroad at the date of their respective deaths. By the testator's will certain freehold land in England was devised upon trust for sale. The beneficiary died intestate, and at the date of his death the land in England still remained unsold. It was held that for the purposes of succession, the land, although subject to the trust for sale, must be treated as an immovable, and that the *lex situs* was applicable.

Parties out of the jurisdiction may be served abroad, but this does not extend the jurisdiction of the Court in granting relief (*l*). But the alteration of the rules of procedure (*m*) may enable the Courts to deal with land abroad in cases where the alteration does not extend the jurisdiction, but only enables the old jurisdiction to be exercised where formerly it could not, merely by reason of defects in the previous rules (*n*).

The cases of restraining actions abroad are distinguishable from those of restraining some act within the jurisdiction by a person resident abroad—*e.g.*, restraining a libel being published in England, for in such case an injunction may be granted, and enforced if the defendant comes into England (*o*), or where a *prima facie* case is

(*g*) 9 Ha. 234; 10 Ha. 254; and see *Hicks* v. *Powell*, L. R. 4 Ch. 741; *Re Maudslay, Sons and Field*, [1900] 1 Ch. 602. (*h*) 10 Ha. 259.

(*i*) *Ex p. Pollard*, Mont. & Ch. 239; cf. *Bank of Africa, Ltd.* v. *Cohen*, [1909] 2 Ch. 129; *Scott* v. *Nesbitt*, 14 V. 438; *Lord Cranstown* v. *Johnston*, 3 V. 170. (*k*) [1923] 1 Ch. 192.

(*l*) *Cookney* v. *Anderson*, 31 B. 452; *Edwards* v. *Warden*, L. R. 9 Ch. 495; cf. *British Controlled Oilfields, Ltd.* v. *Stagg*, 127 L. T. 209.

(*m*) Cf. Order 11, r. 1, R. S. C.

(*n*) *Duder* v. *Amsterdamsch Trustees Kantoor*, [1902] 2 Ch. 132.

(*o*) *Tozier* v. *Hawkins*, 15 Q. B. D. 680; and see *De Bernales* v. *N. Y. Herald*, [1893] 2 Q. B. 97 (n.); Annual Practice (1928), p. 101; Westlake (7th ed.), p. 259.

made out of infringement of a patent within the jurisdiction (*p*), or a trade mark (*q*), or cases within Order 48A, or the former order, as to suing a firm carrying on business within the jurisdiction (*r*).

It has been held that the Courts in England cannot authorise service of a writ out of the jurisdiction except in cases provided for by the R. S. C. (*s*), and that these form a complete code. On the general question of jurisdiction, the observations of Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah, etc.* (*t*), are instructive : " The plaintiff must sue," said Lord Selborne, " in the Court to which the defendant is subject at the time of suit. . . . All jurisdiction is properly territorial. . . . The jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it. It exists always as to land within the territory, and it may be exercised over moveables within the territory; and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. . . . In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court to the jurisdiction of which the defendant has not submitted, is by International Law an absolute nullity."

The jurisdiction of the Court, ordinarily enforced *in personam*, cannot be exercised where the defendant occupies such a position as to be exempt from such jurisdiction—*e.g.*, a foreign Sovereign or government (*u*). It cannot enforce the contracts of a foreign government, even against the property of such government in England (*x*), nor interfere with the acts of a foreign Sovereign done in derogation of his contract (*y*).

(*p*) *Badische, etc.* v. *Henry Johnson & Co.*, [1896] 1 Ch. 25.

(*q*) *Re Burland's Trade Mark*, 41 Ch. D. 542; Annual Practice (1928), p. 100.

(*r*) *De Bernales* v. *N. Y. Herald*, [1893] 2 Q. B. 97 (n.); *St. Gobain, etc.* v. *Hoyermann, etc.*, [1893] 2 Q. B. 96; and as to Order 48A, see *Worcester Bank* v. *Firbank*, [1894] 1 Q. B. 784; *MacIver* v. *Burns*, [1895] 2 Ch. 630.

(*s*) *Re Eager*, 22 Ch. D. 86; *Re Busfield*, 32 Ch. D. 123, 132; *Re Anglo-Africa, etc. Co.*, 32 Ch. D. 348; *Re Wendt*, 22 Q. B. D. 733; and see *Re Cliff*, [1895] 2 Ch. 21; *Re Campbell*, [1920] 1 Ch. 35; Annual Practice (1928), p. 82.

(*t*) [1894] A. C. 670, see pp. 683, 684.

(*u*) Westlake (7th ed.), pp. 267, 276; Annual Practice (1927), pp. 212, 213.

(*x*) *Smith* v. *Weguelin*, 8 Eq. 198; *Twycross* v. *Dreyfus*, 5 Ch. D. 605; *Duff, etc., Ltd.* v. *Government of Kelantan*, [1923] 1 Ch. 385; but see *Larivière* v. *Morgan*, L. R. 7 Ch. 550.

(*y*) *Gladstone* v. *The Ottoman Bank*, 1 Hem. & M. 505; Westlake (7th ed.), pp. 276, 277.

LEGACIES.

ASHBURNER *v.* MACGUIRE.

1784, 1786. 2 Bro. Ch. 108.

Specific Legacy—Ademption.

A legacy of the interest and principal of a bond is specific, and is partially adeemed by the testator having received part of the debt by dividends declared after the bankruptcy of the debtor. A legacy of "my £1,000 East India Stock," is specific, and is adeemed *in toto* by the testator's selling the stock.

William Macguire, by his will, dated September 27, 1778, bequeathed (*inter alia*) as follows:—

"Item, I bequeath to my sister Jane Ashburner, the interest arising from *her husband William Ashburner's bond to me for principal,* £3,500 *sterling* during her life, independent of her present or any future husband, amounting to £175 *sterling per annum. Item,* I bequeath *the principal of the said bond, on the decease of my said sister Jane Ashburner, to her four daughters, Elizabeth, Anne, Sarah, and Sophia, to be equally divided among them* or the survivors of them. *Item,* I bequeath to Mr. William Beawes, *now* at school with the Rev. Mr. Everett, at Felstead, in Essex *my capital stock of* £1,000 *in the India Company's Stock,* with the dividend thereon arising, which dividend is to pay for his education and maintenance till he is qualified for holy orders, and then the capital to be laid out in the purchase of a living for him in the church. This stock is to be continued or disposed of, at the discretion of my executors."

William Ashburner, the debtor, became a bankrupt in February, 1780. In March the testator proved this debt under the commission, and, May 16, 1781, received a dividend thereon of 4s. 3d. in the pound.

The testator died July 12, 1781. Since his death, another dividend of 2s. 9d. had been made to the bankrupt's creditors.

Ashburner v. Macguire.

The testator, at the time of making his will, was possessed of £1,000 East India Stock, and no more, but sold out the whole of it before his death. Beawes, the legatee of this stock, was a natural child of the testator.

The bill was brought by Mrs. Ashburner, her four daughters, and Beawes, to have the whole sum of £3,500 secured for Mrs. Ashburner and her daughters, and to have such part of it as is due out of the estate of Ashburner the bankrupt paid by his assignee, and the residue paid by the personal estate of the testator out of his general effects; and that the personal representative of the testator might also purchase with the testator's personal estate £1,000 East India Stock, and transfer the same for the use of the plaintiff Beawes, as directed by the will. The defendants, the administratrix and residuary legatees, insisted that the plaintiffs, the Ashburners, were entitled only to what remained due to the testator at the time of his death out of the estate of the bankrupt; and that the legacy of East India Stock to Beawes was adeemed by the testator's disposing of it in his lifetime.

The cause was heard before the Lord Chancellor in 1784, and on July 18, 1786, he gave judgment.

Lord Chancellor Thurlow, after stating the case, said—The claim of Mrs. Ashburner and her daughters depended on two questions:—

First, whether the bond was given as a specific legacy; which depends on this, whether the manner in which the sum is mentioned, turns it to a pecuniary legacy, or, as the civilians call it, a demonstrative legacy, that is, a legacy in its nature a general legacy, but where a particular fund is pointed out to satisfy it; or whether it be what they call a *legatum nominis* or *legatum debiti*.

The second question is, whether the legacy, supposing it to be specific, is adeemed, so far as the testator has received dividends, in respect of the debt, or, as the bankrupt's estate, may be insufficient to pay the residue.

I will take the second point first; for this is clearly a specific legacy, according to all the definitions. Wherever a debt, or a

part of a debt, is the subject bequeathed, it is a *legatum nominis*, or *legatum debiti*. I shall not stand long upon that point.

With respect to the second point, as to the ademption, one maxim has gained so much ground as to have been a governing rule, and has been recognised by Lord Talbot and Lord Hardwicke. It is, that where a debt is bequeathed, and is afterwards extinguished by the act or concurrence of the testator, as by demand or suit, the legacy is adeemed, but if paid in without suit or demand, there is no intention to adeem; and there are innumerable authorities that a legacy of a debt is not adeemed by a voluntary payment. Lord Camden, in *The Attorney-General* v. *Parkin* (*a*), expressly exploded this distinction; so did Lord Macclesfield (*b*). I am inclined to adopt their opinions, because I can find no ground for the distinction but a passage in Swinb. sect. 20, p. 7 (*c*). But I doubt if the authors cited by him support him. Godolphin (*d*), referring to the same books, states the rule differently; and so have other writers.

By the civil law it was competent for a man, after he had changed the subject-matter of a specific legacy, to declare, by his conduct, that such a change was no ademption. The case put is of a gold chain, which the testator, after having bequeathed it by his will, converts into a cup; the legacy is not adeemed, because the cup might be restored to its former shape.

This has not been adopted by our law. There is no ground to say that, after a legacy is extinguished, a man, by his conduct, may revive it. It is contrary to common sense, as appears by the instance put. The gold chain may have been given as a legacy, because it had been long in the testator's family. If it be afterwards converted into a gold cup, the reason for giving it ceased.

There is an exception, or limitation to this rule, where the testator alters the form, so as to alter the specification of the subject; as by making wool into cloth, or a piece of cloth into a garment; there the legacy is adeemed, because the subject-matter cannot be restored to its former state.

(*a*) Amb. 566.
(*b*) *Lord Thomond* v. *Earl of Suffolk*, 1 P. W. 461.
(*c*) P. 548 (6th ed.).
(*d*) *Orphan's Leg.* (4th ed.), 434.

This distinction is intelligible, in an action where the thing sued for cannot be recovered *in specie*; but it is not intelligible when applied to a legacy; and, what is more material, never was adopted by our law.

As to legacies of debts, according to the civil law, where the testator had sued for, but had not recovered, or had got judgment, but not execution, or had actually recovered the debt, but had set the money apart for the legatee, or, by words, declared he did not intend to revoke the legacy; in none of these cases was the legacy adeemed. But there is no authority in the civil law for the distinction between a debt being paid without demand, and in consequence of a demand.

Besides, although it can be ascertained where a suit was commenced for a debt, it may be extremely difficult to ascertain whether any demand has been made. If the testator receive payment of the debt, the legacy is gone, unless it appear from the manner of his disposing of the money afterwards that he means to preserve it for the legatee. Lord Camden in *The Attorney-General* v. *Parkin,* held there was no distinction between voluntary payment and payment on a demand, and that in both cases the legacy was extinguished; he added, that where the sum is specified in the bequest, it is a general legacy, as I shall mention on the other point. But the distinction between, I bequeath *the* £500 *due on a bond from A B,* and I bequeath *the bond from A B,* is very slender; and so admitted to be by his Lordship.

In the civil law there is a distinction taken between a demonstrative legacy, where the testator gives a general legacy, but points out the fund to satisfy it, and a specific legacy, where he bequeaths a particular thing.

On the first point, I am clear this is a specific legacy. If the fortune of the testator had failed, so as not to satisfy all the pecuniary legacies, and the question had been, whether this legacy should have been contributive to the pecuniary legacies, I believe no man in the profession would have doubted.

When the testator made his will, £3,500 was due to him from William Ashburner, by bond; he meant to relinquish that bond for the benefit of the family; not by way of release to the husband, but by way of settlement; and that this debt, whether

it turned out ill or well, should go to the family: the interest to his sister for her life, the principal among her daughters. In this case, the bequest must be considered as specific, although the sum be mentioned; *for I cannot agree to Lord Camden's distinction.*

As to the legacy of East India Stock to the plaintiff Beawes, there is no case to countenance his claim. The testator says, "I give *my* capital stock to," etc.; the pronoun *my* has been relied on, in many cases, in deciding the legacy to be specific.

The testator, after making his will, sold his stock, which made it as if it had never existed; *the legacy is adeemed,* according to all the cases.

In questions upon legacies of debts, the cases have crept beyond the original principle, which was the distinction between demonstrative and specific legacies, and recourse has been had to the *animus adimendi,* which has nothing in common with the other principle.

In *Pettiward* v. *P.* (*e*), the Court was of opinion, from all the circumstances, that the testator intended to give a legacy of £2,000, although the debts pointed out for the payment of it amounted only to £1,700; and, therefore, decreed the deficiency to be made good out of the general assets. In *Pawlet's Case* (*f*), the legacy was held to be a pure legacy, or a legacy *in numeratis,* and not *legatum nominis*; and although the debt was paid to the testator, the legacy was decreed. In *Lord Castleton* v. *Lord Fanshaw* (*g*), a legacy of a debt was held to be specific, although the sum was named.

In *Orme* v. *Smith* (*h*) the payment was voluntary; and from thence was inferred an argument that there was no *animus adimendi* (*i*).

In *Lord Thomond* v. *Earl of Suffolk* (*k*), Lord Macclesfield disapproved of the distinction between a debt recovered by suit,

(*e*) Rep. t. Finch, 152.
(*f*) Raym. 335.
(*g*) 1 Eq. Ca. Abr. 298.
(*h*) 1 Eq. Ca. Abr. 302; Gilb. Rep. 82; and 2 Vern. 681.
(*i*) See as to the intention of the testator, Domat. tom. 2, p. 186. *Vide Coleman* v. *C.*, 2 V. 640
(*k*) 1 P. W. 461.

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or paid in voluntarily. A definition of a specific legacy is given by Lord Macclesfield, in *Hinton* v. *Pinke* (*l*), and the advantages and disadvantages, as between a specific and pecuniary legacy, are mentioned; and, among other instances, that the legatee of a debt, which is lost by the insolvency of the debtor, shall have no contribution from the other legatees. In *Crockat* v. *C.* (*m*) the testator bequeathed the sum of £550, which was then in Mr. Ellis's hand; the testator, before making his will, had placed that sum in the hands of Mr. Ellis, and had got his note for it. He had also, before making his will, drawn several bills on Ellis, which had reduced the sum to £430. It was held, by the Master of the Rolls, that as the drafts were all made before the will, and as the note for the full sum was still standing out, the testator should be considered as renouncing the payments, and that he meant to give the whole £550 as a legacy.

I take it to be clear, if a testator gives a cup which is in pawn, it is a full gift, and the executor must redeem.

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Lord Camden, in *The Attorney-General* v. *Parkin* (*n*), decided one point, and left the other open. Parkin, in his will, recites that he had certain mortgages, to the amount of £——, and bonds to the amount of £——. He gives all these, by such enumeration, to Pembroke College, Cambridge. To his sisters, who were next-of-kin, he gave annuities, and declared they should have nothing more under his will. Several sums were afterwards called in, or paid before the testator's death. Lord Camden determined that the sisters were not disappointed by the declaration that they should have nothing but the annuities; he held the legacy to the College was not adeemed as to the sums paid in, upon the ground that the sum was named, which he at the same time admitted to be slight. The testator certainly meant to give everything to the College, except the annuities; but the bequest is in the strictest form of a specific legacy.

In (*o*) *Cartwright* v. *C.*, July 18, 1775, before Lord Bathurst,

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(*l*) 1 P. W. 539. (*m*) 2 P. W. 164.

(*n*) Amb. 566.

(*o*) Stated in the Appendix to Mr. Wooddeson's 3rd vol. of Views of the Laws of England.

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the bequest was, "I give £1,400 *for which I have sold my estate this day,*" etc. The testator afterwards received the whole money, paid it to his banker, and drew out of his hands £1,100 of that money. Lord Bathurst held this to be a legacy of quantity, and that the receiving was no ademption, on the authority of *The Attorney-General* v. *Parkin*; but it is questionable whether that case supports that determination.

In the case before me, the testator plainly intended that his sister, Sarah Ashburner, and her children, should have the debt, owing to him by her husband, secured as a provision for them.

My decree will be that the bond be delivered up to the wife and children, that they may receive the dividend not received by the testator, and whatsoever may hereafter be payable out of the bankrupt's estate in respect of that debt.

The legacy to Beawes is gone, and the bill must be wholly dismissed as to that claim.

NOTES.

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1. Generally.

Legacies are usually said to be of two different kinds, *general* or *specific;* a third, however, may be added, in some degree partaking of the properties of the two former,—a *demonstrative* legacy.

A legacy is *general* where it does not amount to a bequest of any particular thing or money, distinguished from all others of the same kind. Thus, if a testator gives A a diamond ring, or a horse, or £1,000 stock, or £1,000, not referring to any particular diamond ring, horse, stock, or money, as distinguished from others, these legacies will be general.

It may be here mentioned that general pecuniary legacies are bequests of personal property, "described in a general manner" within the meaning of section 27 of the Wills Act (*p*), where no particular fund is indicated for payment, and they will therefore be payable out of personal estate, which the testator has power to appoint in any manner he may think proper, where there are no assets of which the testator was possessed as his own personal estate sufficient to pay the legacies (*q*).

A legacy is specific, *legatum nominis vel debiti*, when it is a bequest of a particular thing, or sum of money, or debt, as distinguished from all others of the same kind. Thus, if a testator gives B "my diamond ring," "my black horse," "my £1,000 stock," or "£1,000 contained in a particular bag," "or owing to me by C," or "the diamond ring, black horse, etc., which I shall be possessed of at the time of my death," in these and like instances the legacies are specific (*r*).

Where a bequest of particular articles is followed by words amounting to a general gift of residue, the bequest of such articles will not be specific (*s*); and the result is the same where the general gift of residue is followed (in the same bequest) by an enumeration of particular articles (*t*).

(*p*) 1 Vict. c. 26.

(*q*) *Hawthorn* v. *Shedden*, 3 Sm. & G. 293; and see *Spooner's Trust*, 2 Si. (N.S.) 129; *Wilday* v. *Barnett*, 6 Eq. 193; *Re Wilkinson*, L. R. 4 Ch. 587.

(*r*) *Bothamley* v. *Sherson*, 20 Eq. 304, 308—310.

(*s*) *Fielding* v. *Preston*, 1 De G. & J. 438; and see *Dummer* v. *Pitcher*, 2 My. & K. 262; *Chapman* v. *C.*, 4 Ch. D. 800; *Bothamley* v. *Sherson*, *supra; Hodgson* v. *Jex*, 2 Ch. D. 122; *Re Green*, 40 Ch. D. 610.

(*t*) *Fairer* v. *Park*, 3 Ch. D. 309; *King* v. *George*, 4 Ch. D. 435; 5 Ch. D. 627; *Re Tootal's Estate*, 2 Ch. D. 628; *Macdonald* v. *Irvine*, 8 Ch. D. 101; *Re Fleetwood*, 15 Ch. D. 594; *sed vide Bethune* v. *Kennedy*, 1 My. & C. 114;

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The fact that a specific part of the personalty is excepted out of a general residuary bequest does not make the gift of residue specific. In *Re Ovey* (*u*), the testator gave a number of pecuniary legacies, and bequeathed "all the personal estate and effects of which he should die possessed, and which should not consist of money or securities for money" to E. A. R. absolutely, and he gave the residue of his real and personal estate to trustees upon the trusts therein mentioned. It was held that, notwithstanding the exception contained in the gift to E. A. R., and notwithstanding also the subsequent gift to the trustees, the bequest to E. A. R. was residuary and not specific, and must contribute with the excepted personalty towards payment of the pecuniary legacies.

A demonstrative legacy, as Lord Thurlow observes in the principal case, "is in its nature a general legacy, but there is a particular fund pointed out to satisfy it." Thus, if a testator bequeaths £1,000 out of his Reduced Bank Three per Cents., the legacy will not be specific, but demonstrative.

It is of importance to distinguish these legacies, because general or pecuniary legacies (in the absence of a contrary intention) are only payable out of the personal estate not specifically bequeathed, and unless charged upon it are not payable out of the real estate (devised either specifically or by way of residue), and if the fund for their payment be insufficient they must abate *inter se pro rata* (*x*); but with regard to *specific legacies* they will not, upon a deficiency of general assets to pay debts, be obliged to abate, until after the general legacies have been exhausted. The rule, however, that a pecuniary legacy (in the absence of a contrary intention) is not payable out of real estate has been modified by the Administration of Estates Act, 1925 (*y*), under which any real estate of which the deceased may die intestate would be liable to payment of the pecuniary legacies (*z*).

A specific legatee is liable to the disadvantage that if the thing specially given be adeemed by the testator either aliening or changing it into a different species of property, he will not be

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Mills v. *Brown*, 21 B. 1; *Clarke* v. *Butler*, 1 Mer. 304; *Hill* v. *H.*, 11 Jur. (N.S.) 806; *Langdale* v. *Esmonde*, 4 Ir. R. Eq. 576; *Fitzwilliams* v. *Kelly*, 10 Ha. 266.

(*u*) 20 Ch. D. 676, on appeal *sub nom. Robertson* v. *Broadbent*, 8 A. C. 812· *Bothamley* v. *Sherson*, *supra*.

(*x*) *Robertson* v. *Broadbent*, 8 A. C. 815.

(*y*) 15 Geo. 5, c. 23.

(*z*) Section 33, sub-section 2.

entitled to claim anything by way of compensation out of the general personal estate. But with regard to a *demonstrative legacy* it is so far of the nature of a specific legacy, that it will not abate with the general legacies until after the fund out of which it is payable is exhausted, and so far of the nature of a general legacy, that it will not be liable to ademption by the alienation or non-existence of the property pointed out as the primary means of paying it (*a*). Where the assets not specifically bequeathed are insufficient to pay debts, specific and demonstrative legacies abate rateably (*b*). The Court is inclined not to construe a legacy as specific, unless clearly so intended (*c*).

2. Legacies of

(α) **Money.** (β) **Debts.** (γ) **Stock, etc.** (δ) **Personal Chattels.**

(*a*) *Legacies of Money.*—A bequest of a sum of money in such a bag (*d*); or in the hands of a certain person (*e*); or invested in a certain named investment (*f*); or even of "all my monies" (*g*) is specific. So where one partner bequeathed to the other £2,000, which appeared to be due to him on the last settlement upon certain trusts, if he did not draw it out of the trade before he died, Lord Hardwicke held that it was a specific legacy (*h*). But a bequest of money for a ring (*i*), or to purchase Government securities (*k*), or lands (*l*), or of an annuity to be purchased out of or charged on the personal estate (*m*), or of so much money "to be paid in

(*a*) *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Williams* v. *Hughes*, 24 B. 474; *Paget* v. *Huish*, 9 Jur. (N.S.) 906; *Jones* v. *Southall*, 32 B. 31; *Bevan* v. *Att.-Gen.*, 4 Gif. 361; *Vickers* v. *Pound*, 6 H. L. Cas. 885; *Disney* v. *Crosse*, 2 Eq. 593; *Hodges* v. *Grant*, 4 Eq. 140; *Re Walford*, [1912] 1 Ch. 219; [1912] A. C. 658.

(*b*) *Re Turner*, [1908] 1 Ir. R. 274; and see Administration of Estates Act, 1925, 1st Schedule.

(*c*) *Kirby* v. *Potter*, 4 V. 742; *Innes* v. *Johnson*, 4 V. 568; *Webster* v. *Hale*, 8 V. 411; *Dickin* v. *Edwards*, 4 Ha. 273; *Sayer* v. *S.*, 7 Ha. 377; *Williams* v. *Hughes*, 24 B. 474, 478.

(*d*) *Lawson* v. *Stitch*, 1 Atk. 507.

(*e*) *Hinton* v. *Pinke*, 1 P. W. 539; *Crockat* v. *C.*, 2 P. W. 165; *Pulsford* v. *Hunter*, 3 Bro. Ch. 416.

(*f*) *Re Slater*, [1907] 1 Ch. 665; *Re Kuypers*, [1925] 1 Ch. 244. Cf. *Re Leeming*, [1912] 1 Ch. 828.

(*g*) *Manning* v. *Purcell*, 2 Sm. & G. 284; 7 De G. M. & G. 55; *Larner* v. *L.*, 26 L. J. Ch. 668.

(*h*) *Ellis* v. *Walker*, Amb. 309.

(*i*) *Apreece* v. *A.*, 1 V. & B. 364.

(*k*) *Lawson* v. *Stitch*, 1 Atk. 507; *Gibbons* v. *Hills*, Dick. 324; *Edwards* v. *Hall*, 11 Ha., at p. 23.

(*l*) *Hinton* v. *Pinke*, 1 P. W. 539.

(*m*) *Alton* v. *Medlicot*, cited 2 Ves. Sen. 417; *S. C.* 3 Atk. 694; *Hume* v. *Edwards*, 3 Atk. 693; *Creed* v. *C.*, 11 Cl. & Fin. 491, 508.

cash " (*n*) is a general legacy. So, " in *Kirkpatrick* v. *K.* (*o*), before Lord Kenyon when Master of the Rolls, legacies were given to persons in India, and legacies to persons in England, to be respectively paid out of the effects in the respective countries, that was held to be only a direction as to the payment, not to make them specific." So, a gift of a legacy, with a direction that it shall be paid as soon as the testator's property in India shall be realised in England, will not make it specific, nor would it fail although the assets had been remitted to England in the lifetime of the testator (*p*).

(*β*) *Legacies of Debts.*—A debt may be specifically bequeathed, either by a gift of the security, as " my East India Bonds " (*q*), " my note of £500 " (*r*), " my navy bills " (*s*); or by a gift of the sum owing upon a particular security, as a bequest of " the money due on an interest note given by A " (*t*), or " due on A's bond " (*u*), " the money now owing to me from A " (*x*); " or the interest of £7,000, security on mortgage of an estate belonging to A " (*y*). Forgiveness of a debt is a specific legacy of the sum owed and forgiven (*z*).

A bequest of a debt is specific, though it is made to several persons in certain shares and proportions, and it is none the less specific in consequence of a life interest being given in it (*z*). So a gift of a *part* or *residue* of a debt is specific (*a*).

If a testator gives a sum out of a debt to one person and the residue to another, the legacies are specific, but if he says, " I give a legacy of a particular sum to A and desire it to be paid out of a debt due to me," the legacy is demonstrative, as the testator

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(*n*) *Richards* v. *R.*, 9 Price, at p. 226.

(*o*) Cited in *Roberts* v. *Pocock*, 4 V., at p. 158.

(*p*) *Sadler* v. *Turner*, 8 V. 617, 624; *Raymond* v. *Brodbelt*, 5 V. 199; *sed vide Chester* v. *Urwick*, 23 B. 402.

(*q*) *Sleech* v. *Thorington*, 2 Ves. Sen. 562, 563.

(*r*) *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623.

(*s*) *Pitt* v. *Camelford*, 3 Bro. Ch. 160.

(*t*) *Fryer* v. *Morris*, 9 V. 360; see also *Ford* v. *Fleming*, 2 P. W. 469; *Chaworth* v. *Beech*, 4 V. 555; *Smith* v. *Pybus*, 9 V. 566; *Gillaume* v. *Adderley*, 15 V. 384; *Davies* v. *Morgan*, 1 B. 405; *Sparrow* v. *Josselyn*, 16 B. 135, *Nelson* v. *Carter*, 5 Si. 530; *Harrison* v. *Jackson*, 7 Ch. D. 339.

(*u*) *Davies* v. *Morgan*, *supra*.

(*x*) *Ellis* v. *Walker*, Amb. 309.

(*y*) *Gardner* v. *Hatton*, 6 Si. 93; cf. *Sidebotham* v. *Watson*, 11 Ha. 170; *Le Grice* v. *Finch*, 3 Mer. 50; *Harrison* v. *Jackson*, *supra*.

(*z*) *Re Wedmore*, [1907] 2 Ch. 277; and see the principal case.

(*a*) *Ford* v. *Fleming*, 1 Eq. Ca. Abr. 302, pl. 3; 2 P. W. 469; *Nelson* v. *Carter*, 5 Si. 530; and see *Oliver* v. *O.*, 11 Eq. 506.

merely points to a fund out of which it is to be paid (*b*). And a bequest of £10,000 sterling "being my share of the capital now engaged in the banking business," was held by Romilly, M.R., to be a demonstrative legacy (*c*). So legacies given "out of the capital employed in the business" (*d*).

(γ) *Legacies of Stock, Government Securities, etc.*—Stock, or Government securities, may be specifically bequeathed, where the specific thing or *corpus* is, as in the principal case, described as "*my*" stock. So a legacy "of my stock," or "in my stock," or "part of my stock," is a specific gift of an aliquot part of stock (*e*). So a bequest of "my shares in a particular company" (*f*), or of "all the stock which I have in the Three per Cents., being, or about £5,000," is specific (*g*); and a bequest "of the interest of the whole of my property in the public funds," was held a specific legacy of £700 Three per Cent. Reduced Annuities, the only property in the public funds which the testator had (*h*). So a bequest "of the interest of £4,500, money in the funds" has been held a specific bequest of £4,000 consols in the names of trustees for the testatrix (*i*). And a bequest of "£2,000 long annuities standing in my name" has been held to be specific, though the testator might only have had a much smaller sum (*k*).

A bequest, moreover, of all the stock a testator *may* be possessed of *at* his death will be specific (*l*).

But a legacy of £10,000 consols "now standing in my name" has been held not to be specific, where the context showed that the testator meant to use the words as designating the value of £10,000 consols and not the sum itself (*m*). And the bequest of

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(*b*) *Duncan* v. *D.*, 27 B. 392; and *Campbell* v. *Graham*, 1 Russ. & M. 453; 8 Bli. (N.S.) 622; *Vickers* v. *Pound*, 6 H. L. Cas. 885.

(*c*) *Sparrow* v. *Josselyn*, 16 B. 135.

(*d*) *Bevan* v. *Att.-Gen.*, 4 Gif. 361.

(*e*) *Per* Lord Alvanley in *Kirby* v. *Potter*, 4 V., at p. 750; and see *Hosking* v. *Nicholls*, 1 Y. & C. C. 478; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Oliver* v. *O.*, 11 Eq. 506; *McClellan* v. *Clark*, 50 L. T. 616.

(*f*) *Miller* v. *Little*, 2 B. 259; *Measure* v. *Carleton*, 30 B. 538; *Kermode* v. *Macdonald*, 1 Eq. 457; L. R. 3 Ch. 584.

(*g*) *Humphreys* v. *H.*, 2 Cox, 184; and see *Cockran* v. *C.*, 14 Si. 248; *Bothamley* v. *Sherson*, 20 Eq. 304. (*h*) *Hayes* v. *H.*, 1 Keen, 97.

(*i*) *Page* v. *Young*, 19 Eq. 501; and see *Vincent* v. *Newcombe*, Young, 599; *Kampf* v. *Jones*, 2 Keen, 756; *Shuttleworth* v. *Greaves*, 4 My. & C. 35.

(*k*) *Gordon* v. *Duff*, 28 B. 519; 3 De G. F. & J. 662.

(*l*) *Fontaine* v. *Tyler*, 9 Price, 94; *Queen's College* v. *Sutton*, 12 Si. 521; *Stephenson* v. *Dowson*, 3 B. 342; *Bothamley* v. *Sherson*, 20 Eq. 304.

(*m*) *Auther* v. *A.*, 13 Si. 422.

the testator's " funded " property has been held not to be sufficiently specific to carry a sum of stock which the testator had purchased in the joint names of himself and his wife, so as to raise a case of election, although the testator had no other stock, and his property exclusive of the stock in the names of himself and his wife was not sufficient to pay his legacies (*n*).

The mere possession, by the testator, at the date of his will, of stock or annuities of an amount equal to or greater than the bequest, where it was made merely in general terms, as *of* stocks or annuities (*o*), or of money *in* particular funds (*p*), or of India bonds (*q*), 500 Egyptian Nine per Cent. bonds (*r*), or 50 shares in the York Union Banking Company (*s*), would not, unless it appeared clearly to be the testator's intention to refer to the identical stock, annuities, bonds, or shares, of which he was possessed, make the gift specific.

And a mere direction to transfer a certain amount of stock, or to pay it as soon as possible, will not make the legacy specific (*t*).

Although stock be given in general terms, if the testator directs a sale for the benefit of the legatee, the legacy will be specific; for that direction would not have been given if the testator intended the stock to be purchased out of his general personal estate (*u*).

And where a testator has given legacies of stock, a gift of the rest, or remainder of the stock " standing in my name," will show that the first legacies were specific (*x*).

Other expressions may show that the testator intended to give some things in existence at the time, and therefore to give specific legacies; where, for instance, there is a bequest of " £4,000 capital stock in the Three per Cent. Consolidated Bank Annuities, or in whatsoever of the Government funds the same should be *found*

(*n*) *Dummer* v. *Pitcher*, 5 Si. 35; 2 My. & K. 262.

(*o*) *Partridge* v. *P.*, Cas. t. Talbot, 226; *Simmons* v. *Vallance*, 4 Bro. Ch. 345; *Webster* v. *Hale*, 8 V. 410; *Wilson* v. *Brownsmith*, 9 V. 180; *Hayes* v. *H.*, 1 Keen, 97; *Johnson* v. *J.*, 14 Si. 313; Theobald (8th ed.), p. 160.

(*p*) *Purse* v. *Snaplin*, 1 Atk. 414; *Bronsdon* v. *Winter*, Amb. 57; *Bishop of Peterborough* v. *Mortlock*, 1 Bro. Ch. 565; *Sibley* v. *Perry*, 7 V. 522, 529, 530; *Webster* v. *Hale*, 8 V. 410; but see *Re Slater*, [1907] 1 Ch. 665; *Re Clifford*, [1912] 1 Ch. 29.

(*q*) *Sleech* v. *Thorington*, 2 Ves. Sen. 562, 563.

(*r*) *Macdonald* v. *Irvine*, 8 Ch. D. 101.

(*s*) *Re Gray*, 36 Ch. D. 205; *Re Gillins*, [1909] 1 Ch. 345.

(*t*) *Sibley* v. *Perry*, 7 V. 522; *Webster* v. *Hale*, 8 V. 410; Theobald (7th ed.), p. 149.

(*u*) *Ashton* v. *A.*, Cas. t. Talbot, 152; 3 P. W. 384.

(*x*) *Sleech* v. *Thorington*, 2 Ves. Sen. 562; *Simmons* v. *Vallance*, 4 Bro. Ch. 345; *Millard* v. *Bailey*, 1 Eq. 378.

invested " (*y*); or refers to " present state of investment " (*z*); or if the will directs that if the testator should not have sufficient stock standing in his name to meet the legacies of stock before given, the executors should purchase sufficient to make up the deficiency (*a*). The fact that the gift of stock is precisely the same amount as that which the testator has standing in his name, formerly added weight to the argument that the gift is specific (*b*); but this view appears to be no longer law (*c*). The rule seems to be that *prima facie*, a bequest of stock or shares in general terms is a general legacy, notwithstanding that the testator, at the date of his will, possessed the precise amount of stock or the precise number of shares, but that the rule will readily yield to indications of a contrary intention. In *Re Hawkins* (*d*), the testatrix bequeathed to various persons a number of stocks and shares set out in two schedules to her will. The investments set out in the schedules corresponded precisely with investments belonging to the testatrix at the time of her death. It was held that the gifts were specific.

Where a married woman, who has a power of appointment over a fund invested in Government stock, by her will gives legacies of specified sums thereof in terms as " £100 of such trust fund," such legacies will be specific; and if the legacies given thereout do not exhaust the fund, a residuary gift thereof will also be specific (*e*), but if the property is to be converted into money and out of the produce the legacies are to be provided they are general (*f*).

A legacy of a *part* of a specific fund is specific (*g*).

A bequest of a specific fund to be sold and divided in definite shares among several persons is specific (*h*) : as are also bequests of parts of money to be received under a policy (*i*), or of parts of the

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(*y*) *Hosking* v. *Nicholls*, 1 Y. & C. C. C. 478.

(*z*) *Re Nottage* (*No.* 2), [1895] 2 Ch. 657.

(*a*) *Townsend* v. *Martin*, 7 Ha. 471; *Queen's College* v. *Sutton*, 12 Si. 521; *Fontaine* v. *Tyler*, 9 Price, 94.

(*b*) *Jeffreys* v. *J.*, 3 Atk. 120; and see *Robinson* v. *Addison*, 2 B. 515; *Re Hawkins*, [1922] 2 Ch. 569.

(*c*) *Re Willcocks*, [1921] 2 Ch. 327.

(*d*) [1922] 2 Ch. 569.

(*e*) *Davies* v. *Fowler*, 16 Eq. 308; and see *Re Young*, 52 L. T. 754; *Walker* v. *Laxton*, 1 Y. & J. 557.

(*f*) *Tatham* v. *Drummond*, 2 Hem. & M. 262; *Davies* v. *Fowler*, *supra*.

(*g*) *Ford* v. *Fleming*, 1 Eq. Ca. Abr. 302, pl. 3; 2 P. W. 469; *Nelson* v. *Carter*, 5 Si. 530; *Oliver* v. *O.*, 11 Eq. 506; *McClellan* v. *Clark*, 50 L. T. 616.

(*h*) *Re Jefferys' Trusts*, 2 Eq. 68

(*i*) *Walpole* v. *Apthorp*, 4 Eq. 37.

proceeds of a sale of land (*k*); and where there is a legacy of "stock out of stock" (*l*), or of money out of a specific fund as a bond debt (*m*), it will be specific (*n*), and on the other hand where there is a bequest not of *part* of certain stock or of *stock* out of stock, but of *money* out of stock, "as of £1,000 out of my Reduced Stock," then the legacy will not be specific, but demonstrative (*o*).

So where a certain sum is given, and the fund in which it is invested and out of which it is to be paid is described or pointed out merely, the legacy will be demonstrative (*p*).

Where a testator makes a specific bequest, for instance, of stock which he accurately describes, that stock only, and not stock of a different denomination, will pass, though the amount be less than what he states it to be (*q*); but if he had at the date of his will no such stock as that which he mentions in his will, other stock nearly answering the description might pass (*r*).

(δ) *Legacies of Personal Chattels.*—A bequest of a brooch which I received as a present from A B (*s*), my horse named Castor (*t*), as many of my horses as will amount to £800 (*u*), any stock of trade of wines and spirituous liquors which I shall be possessed of at the time of my death (*x*), all the books in my chambers (*y*), will be specific, and can only be satisfied by a delivery *in specie*.

But where a person having many chattels of the same kind bequeaths them in such terms as not to show that any particular chattel was intended, and so that the bequest will be satisfied by

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(*k*) *Page* v. *Leapingwell*, 18 V. 463; *Newbold* v. *Roadknight*, 1 Russ. & My. 677.

(*l*) *Morley* v. *Bird*, 3 V. 629; *Hosking* v. *Nicholls*, *supra*.

(*m*) *Badrick* v. *Stevens*, 3 Bro. Ch. 431.

(*n*) *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623; *Mullins* v. *Smith*, 1 Dr. & Sm. 204.

(*o*) *Kirby* v. *Potter*, 4 V. 748; *Deane* v. *Test*, 9 V. 146, 152; *Rogers* v. *Clarke*, C. P. Coop. 376; and see *Jones* v. *Southall*, 32 B. 31; *Hosking* v. *Nicholls*, *supra*; *Mullins* v. *Smith*, *supra*.

(*p*) *Raymond* v. *Brodbelt*, 5 V. 199; *Gillaume* v. *Adderley*, *supra*; *Sparrow* v. *Josselyn*, *supra*; *Thomas* v. *T.*, 3 Ir. Ch. R. 399; and see *Mytton* v. *M.*, 19 Eq. 30; explained in *Re Pratt*, [1894] 1 Ch. 491; *Lambert* v. *L.*, 11 V. 607; *Re Walford*, [1912] 1 Ch. 219; [1912] A. C. 658.

(*q*) *Gilliat* v. *G.*, 28 B. 481; and see cases cited in the note, *ibid.*, p. 484; *Slingsby* v. *Grainger*, 7 H. L. Cas. 273; *Ridge* v. *Newton*, 2 Dr. & W. 239.

(*r*) *Door* v. *Geary*, 1 Ves. Sen. 255; *Dobson* v. *Waterman*, 3 V. 308 (n.); *Penticost* v. *Ley*, 2 J. & W. 207; *Quennell* v. *Turner*, 13 B. 240; *Re Nottage*, [1895] 2 Ch. 657; *Flood* v. *F.*, [1902] 1 Ir. R. 538.

(*s*) Touchstone, 433.

(*t*) *Ibid.*

(*u*) *Richards* v. *R.*, 9 Price, 219.

(*x*) *Stewart* v. *Denton*, 4 Doug. 219.

(*y*) *Green* v. *Symonds*, 1 Bro. Ch. 129 (n.).

something of the same species as that mentioned, the legacy will not be specific. Thus, if A, having many brooches or horses, bequeath "a brooch" or "a horse," in these and such cases the bequests will not be specific, but general (*z*).

"A gift of my grey horse will pass a black horse, which is not strictly grey, if it be found to have been the testator's intention that it should pass by that description. But if the testator has no horse, the executor is not to buy a grey horse" (*a*).

Things ordered by and made for the testator will pass under his will, although not delivered or paid for until after his death (*b*).

3. Specific Bequest for Life of Consumable Articles.

A gift for life, if *specific*, of things "*quæ ipso usu consumuntur*," is a gift of the property, and there cannot be a limitation over after a life interest in such articles (*c*). Thus it was laid down by Knight-Bruce, V.-C., that a gift of "wine, spirits, and hay," to a woman so long as she should be living unmarried, is a gift of the absolute interest (*d*). The result is that such legacy will lapse on the death of the first taker during the life of the testator (*e*). The gift, however, may of course be limited so as to apply only to such as the legatee may require (*f*).

But the gift, it seems, will not as a rule be absolute of consumable articles constituting the testator's stock in trade, as for instance, that of a wine merchant (*g*). The same result has been arrived at with regard to farming stock (*h*).

Hatherley, C., when Vice-Chancellor, arrived at the same conclusion in *Groves* v. *Wright* (*i*), with respect to a gift of farming stock and implements of husbandry for life; but upon the ground that farming stock and implements of husbandry were not things *quæ ipso usu consumuntur*.

If stock in trade be given to a person for life, he will take absolutely, and consequently a gift over thereof will be void, if by

(*z*) Roper on Legacies, vol. i. (4th ed.), p. 93.
(*a*) *Evans* v. *Tripp*, 6 Madd., at p. 92.
(*b*) *Field* v. *Peckett* (*No.* 2), 29 B. 573.
(*c*) *Randall* v. *Russell*, 3 Mer. 190.
(*d*) *Andrew* v. *A.*, 1 Coll. 686, 690; *Twining* v. *Powell*, 2 Coll. 262; *Re Hall's Will*, 1 Jur. (N.S.) 974.
(*e*) *Andrew* v. *A.*, *supra*.
(*f*) *Re Colyer*, 55 L. T. 344.
(*g*) *Phillips* v. *Beal*, 32 B. 25.
(*h*) *Cockayne* v. *Harrison*, 13 Eq. 432; *Myers* v. *Washbrook*, [1901] 1 Q. B. 360.
(*i*) 2 Kay & J. 347. Cf *Bryant* v. *Easterson*, 5 Jur. (N.S.) 166.

the terms of the will the legatee is not to be liable to account for any diminution or depreciation (*k*).

Where a man's wearing apparel was given to his widow for life, with remainder over, it was held by Page-Wood, V.-C., that the wearing apparel did not vest in the widow absolutely as things *quæ ipso usu consumuntur*, and that the sale thereof, and the payment of the income to the widow for her life, was reasonable (*l*).

So if consumable articles are included in a *residuary bequest* for life, they must be sold, and the interest only enjoyed by the tenant for life (*m*).

4. Legacies connected with Realty.

Every devise of land, even in the form of a general residuary devise, is specific (*n*). And a devise of land upon trust to sell and divide the proceeds amongst certain persons makes them specific legatees (*o*).

In *Newbold* v. *Roadknight* (*p*), the testator devised his lands in the county of Warwick upon trust for sale, and after defraying the expenses of sale to pay to T. N. " the sum of £3,000 which I hereby give and bequeath to him accordingly," and to pay the surplus to the persons therein mentioned. After the will the testator sold the land in Warwick, and the question arose after the testator's death whether the gift of the £3,000 was adeemed. It was held that the legacy was specific and accordingly adeemed.

In *Page* v. *Leapingwell* (*q*), the testator devised an estate in trust to sell, but not for less than £10,000, and pay several sums amounting to £7,800, and the overplus moneys arising from the sale to A : Grant, M.R., held that it was a specific legacy of £10,000, and the sale producing less, the other legatees were obliged to abate with A, and that two charitable legacies given out of the fund were void, and fell into the general residue of the testator's estate.

(*k*) *Breton* v. *Mockett*, 9 Ch. D. 95.

(*l*) *Re Hall's Will*, 1 Jur. (N.S.) 974.

(*m*) *Randall* v. *Russell*, 3 Mer. 195; and see notes to *Howe* v. *Lord Dartmouth*, *ante*.

(*n*) See *Hensman* v. *Fryer*, L. R. 3 Ch. 420; *Lancefield* v. *Iggulden*, L. R. 10 Ch. 136.

(*o*) *Page* v. *Leapingwell*, 18 V. 463.

(*p*) 1 Russ. & My. 677.

(*q*) 18 Ves. 463; and see *Williams* v. *Hughes*, 24 B. 474; *Walpole* v. *Apthorp*, 4 Eq. 37; *Re Tunno*, 45 Ch. D. 66; *Re Whitrod*, [1926] Ch. 118.

Ashburner v. Macguire.

A gift of a *rent* out of land or a term of years is specific (*r*). So also every bequest of a lease for years of land (*s*), or of tithes (*t*), is specific.

But if a mere annual sum or a legacy is given, payable *out* of a term or real estate, or merely charged thereon, that will not be a specific but a demonstrative legacy, and effect will be given to it out of the general assets although the particular security intended by the testator happens to fail (*u*). The question to be considered is whether there is a bequest of an annuity or a gift of the income of a fund to be set apart (*x*).

Where there is a trust to raise a sum of money out of land, and a bequest is then made of the same, it will be a specific legacy, and not payable out of the personal estate (*y*). So also where the only gift is in the direction to pay the legacy out of a particular fund, as land, the land alone is liable, and if it fails, the legacy fails also, as it will be specific (*z*). But the mere fact in such case that the personalty is given after the payment of legacies will not make the gift of a sum out of the proceeds of sale of realty demonstrative (*a*).

A gift, however, of real and personal estate on trust to pay thereout the legacies thereafter given, will, it seems, make such legacies demonstrative (*b*).

5. Annuities.

Generally speaking, Annuities given by will are legacies (*c*).

And in general, in the construction of a will, annuities will be comprised within the word "legacies" (*d*), unless there is something in the will to show that the testator himself distinguished

(*r*) *Long* v. *Short*, 1 P. W. 403, and *Creed* v. *C.*, 11 Cl. & Fin. 508, *per* Lord Cottenham; and see *Patching* v. *Barnett*, 51 L. J. Ch. 74, at p. 78.

(*s*) *Long* v. *Short*, 1 P W. 403.

(*t*) *Rudstone* v. *Anderson*, 2 Ves. Sen. 418; *Hone* v. *Medcraft*, 1 Bro. Ch. 261.

(*u*) *Savile* v. *Blacket*, 1 P. W. 778; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Mann* v. *Copland*, 2 Madd. 223; *Livesay* v. *Redfern*, 2 Y. & C. Ex. C. 90; *Willox* v. *Rhodes*, 2 Russ. 452; *Colville* v. *Middleton*, 3 B. 570; *Creed* v. *C.*, 11 Cl. & Fin. 491, 508; *Severs* v. *S.*, 1 Sm. & Gif. 400; *Paget* v. *Huish*, 1 Hem. & M. 663.

(*x*) See *Carmichael* v. *Gee*, 5 A. C. 588.

(*y*) *Welby* v. *Rockcliffe*, 1 Russ. & My. 571; *Dickin* v. *Edwards*, 4 Ha. 273.

(*z*) *Spurway* v. *Glynn*, 9 V. 483, 485.

(*a*) *Rickets* v. *Ladley*, 3 Russ. 418.

(*b*) *Hodges* v. *Grant*, 4 Eq. 140; and see *Williams* v. *Hughes*, 24 B. 474

(*c*) *Ward* v. *Grey*, 26 B. 485.

(*d*) *Sibley* v. *Perry*, 7 V. 522; *Swift* v. *Nash*, 2 Keen, 20.

between them (*e*). It is sometimes important to consider this when the question arises whether under the word "legacies," annuities are charged upon land, or are bequeathed free from the payment of legacy duty. Again, where legacies are directed to be paid out of real estate, an annuity, being a legacy, will also be charged on the same fund (*f*).

Duration.—Whether an annuity is perpetual or whether it is for life only, depends upon the intention of the testator.

If an annuity is given *simpliciter*, then, *prima facie*, a life interest only passes (*g*).

Where an annuity is given for the maintenance and education of children, as it is obvious that it was meant to be for their personal enjoyment and benefit, it will be held not to be meant to be continued beyond their lives, and will not ordinarily be confined to minority (*h*).

A bequest of £30 a year to A together with her children B, C, and D, and *for their joint maintenance*, was held to be a bequest of an annuity to the mother and her children as joint-tenants for the life of the longest liver of them (*i*).

If an annuity be given to one for *life*, and after his death to another simply (*k*), or to one for life with power to him to give it after his death to another or to several others or the survivors or survivor (*l*), unless there are some other circumstances to vary the construction, the subsequent takers, as well as the first annuitant, will take for life only (*m*).

The gift of an annuity for a term or *pur autre vie* to an annuitant, is a gift to him and his personal representatives during the term or the life of the *cestui que vie* (*n*).

(*e*) *Cornfield* v. *Wyndham*, 2 Coll. 184; *Bromley* v. *Wright*, 7 Ha. 334; *Gaskin* v. *Rogers*, 2 Eq. 284. (*f*) *Mullins* v. *Smith*, 1 Dr. & Sm. 204, 211.

(*g*) *Savery* v. *Dyer*, Amb. 139; *Yates* v. *Maddan*, 3 Mac. & G. 532; *Potter* v. *Baker*, 13 B. 273; *Blight* v. *Hartnoll*, 19 Ch. D. 294; *Re Morgan*, [1893] 3 Ch. 222. Cf. *Townsend* v. *Ascroft*, [1917] 2 Ch. 14.

(*h*) *Wilkins* v. *Joddrell*, 13 Ch. D. 564, 570; see also *Soames* v. *Martin*, 10 Si. 287.

(*i*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; and see *Re Booth*, [1894] 2 Ch. 282.

(*k*) *Potter* v. *Baker*, 15 B. 492, and *Blight* v. *Hartnoll*, 19 Ch. D. 294; overruling *Evans* v. *Walker*, 3 Ch. D. 211.

(*l*) *Blewitt* v. *Roberts*, Cr. & Ph. 274; *Yates* v. *Maddan*, 3 Mac. & G. 532; *Sullivan* v. *Galbraith*, 4 Ir. R. Eq. 582.

(*m*) See *Barden* v. *Meagher*, 1 Ir. R. Eq. 250, *per* Walsh, M.R.; *Lett* v. *Randall*, 3 Sm. & G. 83; 2 De G. F. & J. 388; *Townsend* v. *Ascroft*, [1917] 2 Ch., at p. 17.

(*n*) *Re Ord*, 12 Ch. D. 22, 25. See also *Savery* v. *Dyer*, Amb. 139; Dick. 162; *Hill* v. *Rattey*, 2 John. & H. 634, 639; *Re Cannon*, 114 L. T. 231.

Ashburner v. Macguire.

"Where, however, an annuity is directed to be provided out of the proceeds of property, or out of property generally, if an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity if purchased" (*o*).

Where a testator bequeathed to his wife "£200 per year being part of the moneys I now have in bank security," and gave interest expressly for life to other beneficiaries in other parts of his estate, it was held that the wife was entitled, not to a mere life annuity, but to bank stock sufficient in amount to produce £200 a year (*p*).

In *Bent* v. *Cullen* (*q*), the rule was applied to a gift of an annuity out of the income of the testator's personal property; but as to this, Lindley, L.J., in *Re Morgan* (*r*), says: "I cannot help thinking that in *Bent* v. *Cullen* the Lord Chancellor, Lord Hatherley, did for a moment fail to observe the difference between giving a person a portion of the income of a fund and something payable out of it."

It seems that a direction to purchase an annuity in the British funds (*s*), or in Government securities (*t*), amounts to a gift of a perpetual annuity; although if the direction did not refer expressly to British funds or Government securities, a life annuity only could be claimed (*u*).

An intention that the annuity is to be perpetual may be shown in many ways. If, for instance, there is a direction in the will that the annuity is to cease if the legatee dies without issue, if it is directed not to be sold until after the death of the legatee (*x*),

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(*o*) *Per* Lord St. Leonards, C., in *Kerr* v. *The Middlesex Hospital*, 2 De G. M. & G., at p. 583; *Stokes* v. *Heron*, 12 Cl. & Fin. 161; *Potter* v. *Baker*, 13 B. 273; 15 B. 489; *Pawson* v. *P.*, 19 B. 146; *Hill* v. *Rattey*, 2 John. & H. 634; *Ross* v. *Borer*, *ibid.* 469; *Timins* v. *Stackhouse*, 27 B. 434; *Bent* v. *Cullen*, L. R. 6 Ch. 235; observed on in *Re Morgan*, [1893] 3 Ch. 222; *Hicks* v. *Ross*, 14 Eq. 141; *Blight* v. *Hartnoll*, 19 Ch. D. 294.

(*p*) *Rawlings* v. *Jennings*, 13 V. 39; and see *Bignold* v. *Giles*, 4 Drew. 343; *Courtenay* v. *Gallagher*, 5 Ir. Ch. R. 154, 356; *Potter* v. *Baker*, 13 B. 273; 15 B. 489.

(*q*) L. R. 6 Ch. 235.

(*r*) [1893] 3 Ch. 228.

(*s*) *Kerr* v. *The Middlesex Hospital*, 2 De G. M. & G. 576; *sed quære.*

(*t*) *Ross* v. *Borer*, 2 John. & H 469.

(*u*) *Re Grove's Trusts*, 1 Giff. 74; *Banks* v. *Braithwaite*, 32 L. J. Ch. 198; *Re Taber*, 30 W. R. 883; *Re Lord Stratheden and Campbell*, [1893] W. N., at p. 90; Theobald (8th ed.), p. 568.

(*x*) *Hedges* v. *Harpur*, 3 De G. & J. 129; *Pawson* v. *P.*, 19 B. 146.

if the annuity is given over in certain events in fee, or a power of appointing the annuity is given to the legatee, in such terms as would authorise the gift of a perpetual annuity (*y*), strong internal evidence is afforded of an intention to give a perpetual annuity.

Whether charged on Corpus or Payable out of Income.—This is a question of intention to be determined on the words of the will. Where there is a direct legacy of an annuity, charged on the general estate, the annuitant is entitled to have that made good, not only out of the income, but out of the capital, unless there are words sufficient to cut down the claim of the person to the income only, nor can the residuary legatee take anything until all the legacies (in which annuities are included) have been provided for (*z*).

Where a testator directs a sufficient sum to be set apart in order to produce an annuity, which sum is afterwards to fall into residue, if he does not leave sufficient assets (*a*), or the sum set apart is originally insufficient (*b*), or becomes so in consequence of a reduction of interest of the Government funds set apart for its payment, the annuitant will be entitled to be paid out of the corpus, the question being one between the annuitant and the residuary legatee (*c*).

But the corpus will not be liable, where the annuity is to be paid out of the interest of a given fund, with a gift over of the surplus income during the lifetime of the annuitant (*d*), unless the gift over is expressed to be *subject to* the annuity (*e*).

Where, however, an annuity is given out of the rents or profits, dividends or interest of the testator's estate, and the capital given over " after payment of," or " subject to the payment of " the annuity, the corpus will be liable (*f*).

(*y*) *Robinson* v. *Hunt*, 4 B. 450; *Warren* v. *Wright*, 12 Ir. Ch. R. 401; *Townsend* v. *Ascroft*, [1917] 2 Ch. 14

(*z*) *Carmichael* v. *Gee*, 5 A. C. 588, affirming *Gee* v. *Mahood*, 11 Ch. D. 891, 897.

(*a*) *Wright* v. *Callender*, 2 De G. M. & G. 652; and see *Miner* v. *Baldwin*, 1 Sm. & G. 522; *Re Cottrell*, [1910] 1 Ch. 403.

(*b*) *Bright* v. *Larcher*, 3 De G. & J. 148; and see *Perkins* v. *Cooke*, 2 J. & H. 393.

(*c*) See also *May* v. *Bennett*, 1 Russ. 370; *Mills* v. *Drewitt*, 20 B. 632; *Percy* v. *P.*, 35 B. 295; *Carmichael* v. *Gee*, 5 A. C. 588; and *Re Taylor*, 53 L. J. Ch. 1161.

(*d*) *Stelfox* v. *Sugden*, John. 234; *Sheppard* v. *S.*, 32 B. 194; *Darbon* v. *Rickards*, 14 Si. 537; and see *Re Boden*, [1907] 1 Ch. 132; cf. *Re Rose*, 85 L. J. Ch. 22.

(*e*) *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Re Watkins' Settlement*, [1911] 1 Ch. 1; *Re Young*, [1912] 2 Ch. 479.

(*f*) See *Birch* v. *Sherratt*, L. R. 2 Ch. 644; *Re Mason*, 8 Ch. D. 411;

Ashburner v. Macguire.

Where there is a mere direction to set apart a sum of money for payment to A out of the interest or dividends of a certain annual sum, with a gift over on A's death, the case is one of tenant for life and remainderman (*g*).

Where an annuity is charged upon real (*h*) or personal (*i*) property, the corpus is ordinarily liable for the arrears (*k*), even although there be a subsequent declaration in the will that the annuity is to abate in favour of another annuity in the event of the income of the property being insufficient to pay both (*l*). *Secus*, where there is a trust to pay the annuities out of the growing profits (*m*).

Where an annuity is charged on corpus, there is a discretionary equitable jurisdiction to order a sale or mortgage to raise arrears (*n*).

An annuity may, according to the construction of a will, be held to be after the death of the annuitant a continuing charge upon rents and profits, until the arrears of the annuity are paid, but not a charge upon the corpus (*o*). In *Re Young* (*p*), Parker, J., doubted whether there was any difference between a charge on corpus and a continuing charge on income.

Where the bequest of an annuity is accompanied with a direction to set apart a fund to secure it, the annuitant is not entitled as against residuary legatees to have the capitalised value of the annuity paid to him (*q*), but where the estate is insufficient for

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Phillips v. *Gutteridge*, 4 De G. & J. 531; *Stamper* v. *Pickering*, 9 Si. 176; *Ex p. Wilkinson*, 3 De G. & Sm. 633; *Playfair* v. *Cooper*, 17 B. 187; *Percy* v. *P.*, 35 B. 295; *Re Howarth*, [1909] 2 Ch. 19; *Re Watkins' Settlement*, [1911] 1 Ch. 1; *Re Young*, [1912] 2 Ch. 479; *Re Buchanan*, [1915] 1 Ir. R. 95.

(*g*) *Baker* v. *B.*, 6 H. L. Cas. 616; see *Att.-Gen.* v. *Poulden*, 3 Ha. 555; *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Michell* v. *Wilton*, 20 Eq. 269; *Re Mason*, 8 Ch. D., at p. 414.

(*h*) *Picard* v. *Mitchell*, 14 B. 103; *Byam* v. *Sutton*, 19 B. 556; *Howarth* v. *Rothwell*, 30 B. 516.

(*i*) *Gordon* v. *Bowden*, 6 Madd. 342.

(*k*) *Swallow* v. *S.*, 1 B. 432 (n).

(*l*) *Pearson* v. *Helliwell*, 18 Eq. 411.

(*m*) *Philipps* v. *P.*, 8 B. 193; *Miller* v. *Huddlestone*, 3 Mac. & G. 513, 530; *Hindle* v. *Taylor*, 20 B. 109; *Salvin* v. *Weston*, 14 W. R. 757.

(*n*) *Re Tucker*, [1893] 2 Ch. 323; and see *Hambro* v. *H.*, [1894] 2 Ch. 564; *Blackburne* v. *Hope Edwardes*, [1901] 1 Ch. 419.

(*o*) See *Booth* v. *Coulton*, L. R. 5 Ch. 684; *Re Boden*, [1907] 1 Ch. 132; *Re Howarth*, [1909] 1 Ch. 485, varied [1909] 2 Ch. 19; *Philipps* v. *P.*, 8 B. 193; *Forbes* v. *Richardson*, 11 Ha. 354; *Phillips* v. *Gutteridge*, 4 De G. & J. 531; *Salvin* v. *Weston*, 14 W. R. 757; *Taylor* v. *T.*, 17 Eq. 324; *Re Mason*, 8 Ch. D. 411.

(*p*) [1912] 2 Ch. 479.

(*q*) *Wright* v. *Callender*, 2 De G. M. & G. 652; and see *Miner* v. *Baldwin*, 1 Sm. & G. 522.

payment of the annuity and the pecuniary legacies, the course adopted by the Court is to value the annuity as at the date of the testator's death, to treat the amount of the valuation as a legacy, and making it abate in due proportion, to pay the abated amount to the annuitant (*r*). In *Re Cottrell* (*s*), the testatrix bequeathed pecuniary legacies amounting together to £200 and gave an annuity of £1 a week to her husband, with a direction that the trustees should set apart a fund sufficient to provide out of the income for the annuity, and the testatrix gave her residuary estate upon trusts. The net estate amounted to £1,250, which sum was insufficient to enable a fund to be set apart to provide for the annuity and to pay the legacies; but it was sufficient to pay in full the capital value of the annuity and the legacies, and it was held that this was the proper course to adopt.

A specific sum to be spent in the purchase of an annuity, whether the annuity be in possession or reversion, will, however, vest in the annuitant (*t*), and under a general direction for *purchase*, the annuitant is entitled to receive the money which would be required for that purpose (*u*), although there be a declaration in the will that he shall not be allowed to receive the value (*x*), or there be a discretionary trust to apply the annuity for the benefit of the annuitant in case of incapacity (*y*), or though the annuitant died before the annuity was to be purchased (*z*).

A direction that an annuity shall cease on bankruptcy or alienation is inoperative if there is no gift over (*a*). It would seem that where there is a bequest under which the annuitant is entitled to have an annuity purchased in his own name or the capitalised value of the annuity, a gift over or direction that the annuity is to sink into residue in the event of bankruptcy or alienation is inoperative (*b*). On the other hand, where the annuity

(*r*) *Re Cottrell*, [1910] 1 Ch., at p. 407; *Re Richardson*, [1915] 1 Ch. 353. Cf. *Re Dempster*, *ibid.* 795. (*s*) [1910] 1 Ch. 402.

(*t*) *Yates* v. *Compton*, 2 P. W. 309; *Barnes* v. *Rowley*, 3 V. 305; *Bayley* v. *Bishop*, 9 V. 6; *Palmer* v. *Craufurd*, 3 Swans. 482.

(*u*) *Dawson* v. *Hearn*, 1 Russ. & M. 606; *Re Robbins*, [1907] 2 Ch. 8; and see *Ford* v. *Batley*, 17 B. 303; *Yates* v. *Y.*, 28 B. 637; *Palmer* v. *Craufurd*, 3 Swans. 482, 488; *Woodmeston* v. *Walker*, 2 Russ. & M. 197; *Day* v. *D.*, 1 Drew. 569.

(*x*) *Stokes* v. *Cheek*, 28 B. 620; *Re Mabbett*, [1891] 1 Ch. 707, 714.

(*y*) *Re Browne's Will*, 27 B. 324.

(*z*) *Re Robbins*, *supra*; *Re Brunning*, [1909] 1 Ch. 276.

(*a*) See *per* Kekewich, J., in *Re Mabbett*, [1891] 1 Ch. 707; cf. *Re Dempster*, [1915] 1 Ch. 795.

(*b*) *Hunt-Foulston* v. *Furber*, 3 Ch. D. 285; and see *Re Mabbett*, [1891] 1 Ch. 707; cf. *Re Dugdale*, 38 Ch. D. 176.

is under the terms of the bequest to be vested in trustees upon trust for the benefit of the annuitant, then a direction that on alienation or bankruptcy the annuity is to cease or fall into residue or go over is operative (*c*).

Where there was a bequest by will of annuities charged on land, and subject thereto a devise on trust for sale, and a discretionary power given by codicil to purchase Government annuities for the annuitants, it was held that the legal personal representative of an annuitant who died after a contract for sale by the trustees, but before completion of the sale, was not entitled to the sum that would have been spent in purchasing his annuity, but that the representatives of an annuitant who died after completion were so entitled (*d*).

And where there is a discretionary trust to purchase an annuity, advances to the legatee from time to time may be made by the trustees. Thus where a bequest was made of a share of a residue upon trust to pay the income to A for life, with a proviso that it should be lawful for the trustees, *if they should think it desirable*, to purchase with such share for the benefit of A an irredeemable annuity. No annuity was purchased, but the acting trustee paid A sums out of the capital of the share. The power was held well exercised, and the remaindermen on the death of A only entitled to so much of the share as was undisposed of (*e*).

Where a testator has entered into a covenant to pay an annuity, the annuitant is not entitled to have the estate or a portion of it sold for the purpose of obtaining payment of the value of the annuity in a gross sum (*f*).

6. Whether Bequests contained in a Residuary Clause are Specific or General. Bequest of a Residue when Specific.

A bequest of personalty in a residuary clause, even though comprised in the same sentence with a general devise of realty (which is specific) is ordinarily a general and not a specific legacy (*g*), and, as we have before seen, it is not the less general because it is either preceded or followed by an enumeration of some of the particular

(*c*) *Power* v. *Hayne*, 8 Eq. 262; *Hatton* v. *May*, 3 Ch. D. 148; *Re Dempster*, *supra*.

(*d*) *Re Mabbett*, [1891] 1 Ch. 707; and see *Re Robbins*, [1906] 2 Ch. 648; [1907] 2 Ch. 8.

(*e*) *Messeena* v. *Carr*, 9 Eq. 260.

(*f*) *Yates* v. *Y.*, 28 B. 637.

(*g*) *Howe* v. *Earl of Dartmouth*, 7 V. 138; and notes *ante*.

articles of which it may consist, *ante*, p. 663. Where a part of a general residuary bequest is affected by a trust, created by the testator in a non-testamentary instrument assented to by the legatee, that part is to be deemed as if bequeathed specifically for purposes of administration (*h*).

If, however, the bequest be restricted to property in a particular locality it will be specific. If a testator bequeaths "all the residue of my personal estate in the island of Jamaica" (*i*), in a particular county (*k*), or room (*l*), or *at* a particular place (*m*), the legacy will be specific. *A fortiori*, where there is a gift of plate, linen, and furniture in a particular house, or which shall be therein at the time of the testator's decease (*n*).

7. Effect of the Wills Act upon Specific Bequests.

Previous to the Wills Act (*o*), a bequest of "my stock," "my shares," or "the black horses I now have," would be specific, and would pass only such stocks, shares, or black horses as the testator possessed at the time when he made his will, the time of the making of the will in absence of a contrary intention expressed by the testator, being the time for ascertaining the extent of the specific bequest (*p*).

Where, however, even previous to the Wills Act, bequests were made rendering the time for the ascertainment of the legacies the time of the death of the testator, they were nevertheless specific. Thus a bequest of "any stock-in-trade of wines and spirituous liquors which I shall be possessed of at the time of my death" (*q*), of "all the horses which I may have in my stable at the time of my death" (*r*) were specific. In one case of a legacy of stock ascertainable at death it was held that such legacy was not specific since it was incapable of ademption (*s*). This case, however, must be considered as overruled, and contrary to the whole current of

(*h*) *Re Maddock*, [1902] 2 Ch. 220.
(*i*) *Nisbett* v. *Murray*, 5 V. 149; *Robinson* v. *Webb*, 17 B. 260.
(*k*) *Moore* v. *M.*, 1 Bro. Ch. 127.
(*l*) *Green* v. *Symonds*, 1 Bro. Ch. 129 (n.).
(*m*) *Sayer* v. *S.*, 2 Vern. 688; *S. C.*, Pr. Ch. 392.
(*n*) *Gayre* v. *G.*, 2 Vern. 538; *Shaftsbury* v. *S.*, *ibid.*, 747; *Land* v. *Devaynes*, 4 Bro. Ch. 537; and see *Re Stamford* (*Earl*), 22 T. L. R. 632.
(*o*) 1 Vict. c. 26.
(*p*) *Kirby* v. *Potter*, 4 V. 748; *Humphreys* v. *H.*, 2 Cox, 184; *Miller* v. *Little*, 2 B. 259.
(*q*) *Stewart* v. *Denton*, 4 Doug. 219.
(*r*) *Fontaine* v. *Tyler*, 9 Price, 94; and see *Stephenson* v. *Dowson*, 3 B. 342.
(*s*) *Parrott* v. *Worsfold*, 1 J. & W. 594.

authorities, and, as observed by Jessel, M.R., " A specific legacy cannot be subject to ademption when the time of the death is the time for the ascertainment; for a man does not live after his own death, and therefore there is no period at which ademption can taken place " (*t*).

The question has been frequently raised, how far specific bequests have been affected by the Wills Act, which provides :—

Section 24. " Every will shall be construed, *with reference to the real estate and personal estate comprised in it* (*u*), to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

The cases upon this subject are fully discussed in *Bothamley* v. *Sherson* (*x*). There a testator, by will in 1869, made a bequest of all " my shares of stock in the Midland Railway Company " to trustees upon certain trusts. Jessel, M.R., held that it was a specific legacy. " No doubt," said his Lordship, " one class of specific bequests is affected by the Act, namely, the class of specific bequests described as generic, that is, a specific bequest which points to a class of objects given by the testator, and which from their nature would not naturally be referable to the date of the instrument. A good illustration of this class of bequests is a gift ' of my household furniture.' There are very few persons not *in articulo mortis* who would not expect that some articles of household furniture would wear out, or be broken, or otherwise be parted with, and be replaced by other articles of a similar kind. It would not be natural to assume that a man giving that kind of legacy intended to restrict it to the property of that description which he had at the date of the will. It has been held in *Goodlad* v. *Burnett* (*y*), and in some other cases to which reference has been made, that in cases of that description the new law brings down the specific bequest to the date of the death; in other words, the new law makes a specific bequest of ' my furniture,' to mean not ' the furniture which belongs to me at the time of making this my will,' but ' the furniture which shall belong to me at the time of my death ' " (*z*).

(*t*) *Bothamley* v. *Sherson*, 20 Eq. 309, 310.

(*u*) As to the important qualification created by the words set out in the text in italics, see *Bullock* v. *Bennett*, 7 De G. M. & G. 283, 285.

(*x*) 20 Eq., pp. 312, 313; see also Hawkins on Wills (3rd ed.), ch. 1.

(*y*) 1 K. & J. 341.

(*z*) See also *Lady Langdale* v. *Briggs*, 8 De G. M. & G. 391; *Trinder* v. *T.*,

If the words referring to present possession or title are an essential part of the description, the effect of the gift depends, *prima facie*, upon the condition at the date of the will and not upon that at the date of the death. In *Re Champion* (*a*), the testator devised his cottage and all his lands in the parish of Dorking " now in my own occupation." After the date of the will the testator purchased two fields adjoining the cottage. It was held that these fields passed under the devise; but between the date when he purchased these fields and the testator's death he had made a codicil confirming the will. In *Cole* v. *Scott* (*b*), the testator gave " all the estates of which I am now seised or possessed." It was held that reading the will as a whole the testator showed that he used the word " now " with reference to the date of the will, and that accordingly there was a contrary intention within section 24.

In *Re Sikes* (*c*) it was held that a bequest of " *my* piano " had been adeemed, the testatrix having sold the piano she possessed at the date of the will and purchased a very different one. So a devise of " my Quendon Hall estates " was confined to estates answering the description at the date of the will (*d*). In *Re Bridger* (*e*), Davey, L.J., said : " If the words describe a particular property which the testator had at the date of his will, that and that alone will pass; and in *Re Portal and Lamb* (*f*), Lindley, L.J., referring to section 24 of the Wills Act, said : " That refers to the real and personal estate comprised in the will, and nothing else. *It does not say that we are to construe whatever a man says in his will as if it were made on the day of his death.*" In *Re Evans* (*g*), the testator gave to his wife for life, with remainder to his daughter, " house and effects known as Cross Villa, situate in Templeton." At the date of the will the testator was possessed of half an acre with a house upon it in which he resided, the

1 Eq. 695; *Morrice* v. *Aylmer*, L. R. 10 Ch. 148; *Douglas* v. *D.*, Kay, 400; *Moore* v. *Madden*, 2 Ir. R. Eq. 511; *Beahan* v. *B.*, 3 Ir. R. Eq. 427; *Ferguson* v. *F.*, 6 Ir. R. Eq. 199; *Corbet* v. *C.*, 7 Ir. R. Eq. 456; *Castle* v. *Fox*, 11 Eq. 542; *Re Earl's Trust*, 4 K. & J. 673; *Re Ord*, 9 Ch. D. 667; 12 Ch. D. 22; *Re Champion*, [1898] 1 Ch. 101; *Re Evans*, [1909] 1 Ch. 784; *Re Gillins*, [1909] 1 Ch. 345.

(*a*) [1893] 1 Ch. 101.
(*b*) 1 M. & G. 518.
(*c*) [1927] 1 Ch. 364.
(*d*) *Webb* v. *Byng*, 1 K. & J. 580.
(*e*) [1894] 1 Ch. 297, 302.
(*f*) 30 Ch. D., p. 55.
(*g*) [1909] 1 Ch. 784. Cf. *Re Davies*, [1925] 1 Ch. 642.

Ashburner v. Macguire.

premises being known as " Cross Villa." After the date of the will the testator erected upon part of the land which he separated from the rest by a hedge, two semi-detached dwellings, which he named " Ashgrove Villas," into one of which he moved his residence. It was held by Joyce, J., that the description of the house in the will was " so particular and precise " as to exclude section 24, and that the land, with all the buildings thereon, passed by the devise, since at the date of the will the whole of the land was known as Cross Villa.

Where there is a bequest of a distinct and specific thing, there is a sufficient indication of a " contrary intention " to exclude the 24th section of the Wills Act. Hence, if a testator, after bequeathing a specific thing, as stock, or a horse, or a picture, were to sell it, the legacy being thereby adeemed, nothing would pass to the legatee, although the testator before his death purchased similar stock, a horse or a picture of the same kind. Thus, in *Re Gibson* (*h*), a testator being at the time possessed of £1,000 " *guaranteed stock* " in the North British Railway, bequeathed to his son " my one thousand North British Railway Preference Shares." After making his will, he sold his North British guaranteed stock, and died possessed of shares and stock in the North British Railway, acquired by several successive purchases, exceeding the amount bequeathed to his son. It was held by Wood, V.-C., that the bequest, being of a specific thing, which had been sold by the testator, the legacy had been adeemed and the son was not entitled to have his legacy satisfied out of the shares and stocks purchased since the will. " Suppose," said the Vice-Chancellor, " a man to have, at the date of his will, a picture of the Holy Family, by some inferior artist, and to give by his will ' my Holy Family.' He afterwards disposes of this picture, and subsequently acquires by purchase or gift a very much better one, on the same subject, painted by an eminent artist. Would it not be a monstrous construction to hold, that the picture existing in the testator's possession at the time of his death would pass? When there is a clearly indicated intention upon the face of the will, to give the single specific thing and nothing else, it would be a very narrow construction of the words of section 24 of the Wills Act to hold that you must sweep in everything to which the words might be held to apply, without the slightest reference to the state of things

(*h*) 2 Eq. 669; and see *Re Evans*, [1909] 1 Ch., p. 786.

existing at the date of the will. It is true that the testator had not at the date of his will 1,000 shares, but £1,000 guaranteed stock. But he had nothing else to which the words of the will could be applied, and no one could doubt that this stock was the thing pointed out by the will. After the date of his will he sold this £1,000 stock, and purchased not *uno ictu*, but bit by bit a number of other shares or stock. . . . I adhere to my view, that where there is a distinct reference to a distinct and specific thing, and not to a genus, there is sufficient indication of ' a contrary intention ' to exclude the operation of the rule established by the 24th section of the Wills Act, and limit the operation of the will to the state of things existing at the date of the will." In *Re Gillins* (*i*), the testator was possessed, at the date of his will, of a number of ordinary shares of £50 each, with £5 credit as paid up, in an assurance company. He bequeathed twenty-five of the company's shares to W. After the will the shares were divided into £10 shares with £1 paid up. The testator sold several of the £50 shares and of the £10 shares. Held that section 24 applied and W took 25 £10 shares as existing at the death. In *Re Clifford* (*k*), the testator, who held 104 £80 shares in a company, made a bequest of " twenty-three of the shares belonging to me." After the date of the will the £80 shares in the company were sub-divided into £20 shares, so that the testator became possessed of 416 £20 shares. It was held that section 24 of the Wills Act was excluded by the terms of the bequest, but that, as the twenty-three shares bequeathed, although changed in name and form, existed substantially in their sub-divided form at the testator's death, there was no ademption, and that the legatee was accordingly entitled to ninety-two of the £20 shares.

Nothing will pass as a specific legacy, unless the testator has actually acquired it before the time of his death. Thus, if a testator, who has made a specific bequest of all the money in the public funds of which he may die possessed, gives instructions to his broker to purchase stock, but no stock is purchased until after the death of the testator, it will not pass by his will, even though the broker may in his books have given him credit for the stock (*l*); but if the broker had entered into a contract for the purchase of

(*i*) [1909] 1 Ch. 345; and see *Re Jameson*, [1908] 2 Ch. 111.

(*k*) [1912] 1 Ch. 29; and see *Re Leeming*, [1912] 1 Ch. 828; *Re Kuypers*, [1925] 1 Ch. 244; Hawkins on Wills (3rd ed.), p. 28.

(*l*) *Thomas* v. *T.*, 27 B. 537.

the stock before the testator's death, the vendor would be held a trustee of the stock for the testator, and it would consequently pass by his will (*m*). The result would be the same where the broker was the owner of the stock, and gave the owner credit for the amount in his books (*n*).

8. Legatee's Right of Selection.

If a testator bequeaths to a legatee a given number of articles, forming part of a stock of articles of the same description; as, for instance, if he has twenty horses in his stable, and bequeaths six of them, or if he has three houses in a street, and he devises two of them, the legatee has the right of selection (*o*).

Upon the same principle, if a testator has shares in an undertaking, part of which are fully paid up, and part partially paid up, and he bequeaths a certain number of them specifically, the specific legatee has the option of selecting those shares that are fully paid up, even although the shares are given to trustees in trust for the legatee (*p*). But this right of selection does not exist where the will shows that the testator intended to give some particular property to the legatee, for the selection by the testator is incompatible with the right of selection in the legatee (*q*).

A gift to a legatee of such parts of property of a particular kind, as for instance plate, as he may signify his intention to possess, in effect amounts to a gift of the whole, for it has been said that, following the words of the will literally, the legatee might take the whole of the plate with the exception of one article probably of no value, and then the maximum *de minimis non curat lex* would apply (*r*).

9. Gifts to be applied (1) for Particular Object, or (2) at Discretion for Benefit of Legatee.

As regards gifts to trustees, either to apply in a particular mode directed by the testator for the benefit of the legatee, or with discretionary power to apply for the benefit of the legatee, if no other

(*m*) *Thomas* v. *T.*, 27 B., at p. 541. (*n*) *Ellis* v. *Eden*, 25 B. 482.

(*o*) *Jacques* v. *Chambers*, 2 Coll. 435; *Richards* v. *R.*, 9 Price, 226; *Kennedy* v. *K.*, 10 Ha. 438; *Hobson* v. *Blackburn*, 1 My. & K. 571; *Duckmanton* v. *D.*, 5 H. & N. 219; *Tapley* v. *Eagleton*, 12 Ch. D. 683; *Asten* v. *A.*, *infra*; *Re Cheadle*, *infra*.

(*p*) *Jacques* v. *Chambers*, 2 Coll. 435; and see *Millard* v. *Bailey*, 1 Eq. 378.

(*q*) *Asten* v. *A.*, [1894] 3 Ch. 260; *Re Cheadle*, [1900] 2 Ch. 620.

(*r*) *Arthur* v. *Mackinnon*, 11 Ch. D. 385; *Re Sharland*, 74 L. T. 644.

person is interested, it has been frequently held that the legatee or his assigns can claim the property free from the discretion or restrictions. "There is no doubt," said Page-Wood, V.-C., in *Re Skinner's Trusts* (*s*), "that if the main object of the gift is to benefit the person who is to take, and no other person is interested in the bequest, in such a case, if the gift cannot be applied to the purposes specified, or if the legatee prefers to have it otherwise applied, he has the option of saying that, although the testator has expressly desired that the benefit should be conferred in a particular form, and he does not like to take it in that manner, he may ask the Court to give him the property absolutely. On the other hand, if there is another purpose distinctly and clearly expressed, independent of the object of benefiting the legatee and beyond the mere intimation of a wish as to the mode in which the benefit shall be conferred, there it is settled that the principle does not apply." The question in every case is, therefore, which is the dominant object, the benefit of the legatee, or the manner of benefiting him mentioned in the bequest?

This test has been applied in a variety of cases and the legatee held entitled, *e.g.*, where the legacy is for the apprenticeship of an infant, and the infant dies before he is of competent age to be put out (*t*), or to put an infant into holy orders and he becomes a lunatic (*u*), or to purchase a commission or promotion for the legatee and this becomes impossible, impracticable, or undesirable (*x*), or to pay off a mortgage which is foreclosed (*y*). So also where the interest of a fund was bequeathed to pay the rents due on specifically bequeathed leaseholds, and the leaseholds being a *damnosa hereditas* were sold by order of the Court, the legatees of the leaseholds were held entitled to the interest of the fund (*z*). Similarly where very wide discretionary powers over a fund are given to trustees in favour of some person, the inference has been drawn that the person was entitled absolutely to the fund, though the discretion be not exercised or the death of the person in question makes the exercise of the discretion impossible (*a*).

(*s*) 1 John. & H. 102.

(*t*) *Barlow* v. *Grant*, 1 Vern. 255.

(*u*) *Barton* v. *Cooke*, 5 V. 461.

(*x*) *Leche* v. *Lord Kilmorey*, T. & R. 207; *Palmer* v. *Flower*, 13 Eq. 250.

(*y*) *Lockhart* v. *Hardy*, 9 B. 379.

(*z*) *Lonsdale* (*Earl*) v. *Berchtoldt* (*Countess*), 3 K. & J. 185; and see *Re Bowes*, [1896] 1 Ch. 507; *Mexborough* (*Earl of*) v. *Savile*, 88 L. T. 131.

(*a*) *Gude* v. *Worthington*, 3 De G. & Sm. 389; *Gough* v. *Bult*, 16 Si. 45; cf. *Re Stranger*, 60 L. J. Ch. 326; *Re Johnston*, [1894] 3 Ch. 204.

On the other hand, the power may be held to be in effect merely one of advancement, and the beneficiary can claim nothing unless the power is exercised (*b*), though the Court will, if necessary, inquire as to whether the occasion for its exercise has arisen (*c*).

Where there is an absolute bequest, a provision in the will that the legatee's enjoyment of the legacy shall be postponed until he attains an age later than twenty-one, is nugatory (*d*).

Where a discretionary power is vested in trustees to apply for the benefit of a legatee, and no other person is interested and no power given to withhold part of the fund, such discretion may be determined by the legatee or his alienees. Thus where there was a trust of a sum to be invested for the benefit of a son of the testator on attaining twenty-one, and applied as the trustees in their discretion might think fit, it was held that the son was absolutely entitled to the legacy free from the discretionary power of the trustees (*e*). And if the legatee becomes bankrupt the property subject to the trust will pass to his trustee in bankruptcy (*f*).

Different considerations apply where the modern form of discretionary trust is employed and trustees are empowered to apply the capital or income of a fund for the benefit of a number of persons at their discretion. In *Re Coleman* (*g*), there was a direction to trustees to apply income "in and towards the maintenance, education, and advancement" of the children in such manner as they should deem most expedient until the youngest of the children attained twenty-one. There being four children, it was held that the assignee of one of them, J. S. Coleman, was entitled to nothing except what the trustees chose in their discretion to pay. Cotton, L.J., said (*h*): "This is not a void attempt to make shares given to children inalienable, so as to exclude their creditors; it is a power to the trustees to give to each child what they think fit; and if they cannot altogether exclude a child who has become bankrupt or assigned his interest, they can allot to him as little as they think

(*b*) *Re Ward's Trusts*, L. R. 7 Ch. 727.

(*c*) *Lewis* v. *L.*, 1 Cox, 162; *Robinson* v. *Cleator*, 15 V. 526.

(*d*) *Saunders* v. *Vautier*, Cr. & Ph. 240; *Gosling* v. *G.*, John. 265, 272; *Wharton* v. *Masterman*, [1895] A. C. 186; and see *Re Travis*, [1900] 2 Ch. 541; *Re Trevanion*, [1910] 2 Ch. 538.

(*e*) *Re Johnston*, [1894] 3 Ch. 204.

(*f*) *Green* v. *Spicer*, 1 Russ. & M. 395; *Younghusband* v. *Gisbourne*, 1 Coll 400; *Piercy* v. *Roberts*, 1 My. & K. 4; *Snowdon* v. *Dales*, 6 Si. 524; *Godden* v. *Crowhurst*, 10 Si. 642; but see *Re Bullock*, 64 L. T. 736; 60 L. J. Ch. 341; and cf. *Re Fitzgerald*, [1904] 1 Ch. 573.

(*g*) 39 Ch. D. 443; *Godden* v. *Crowhurst*, *supra*.

(*h*) 39 Ch. D., at p. 451.

desirable. Then does the assignment include every benefit which the trustees give to J. S. Coleman out of the income? I think not. If the trustees were to pay an hotel keeper to give him a dinner he would get nothing but the right to eat a dinner, and that is not property which could pass by assignment or bankruptcy. But if they pay or deliver money or goods to him, or appropriate money or goods to be paid or delivered to him, the money or goods would pass by the assignment."

In all cases of this nature the question turns on whether the receipt of any benefit by the *cestui que trust* is subject to the discretion of the trustee. If it is so subject, then he has no interest which he can assign or which will pass to the trustee in his bankruptcy, but income or property handed over to him by the trustees will, it seems, pass to his trustee in bankruptcy (*i*). Where the trustees have discretion to pay or apply the whole or any "part" of the income for the benefit of the legatee it has been held that the receiver in bankruptcy of the legatee could claim nothing from them (*k*).

In these cases the difficult practical question arises :—What may the trustees do for any object of the discretionary trust who has become bankrupt or alienated his interest?

In *Re Neil* (*l*) there was a trust to apply the whole or any part of income or accumulations for the support, maintenance, or education, or otherwise for the benefit of a son, his wife, and children, as the trustees in their discretion should think fit. The son assigned his interest, and after notice of the assignment the trustees continued to make payment to the son, and it was held by Kekewich, J., that money paid to him or any person on his behalf, excluding the special case put by Cotton, L.J., in *Re Coleman* (*supra*) was necessarily part of his beneficial interest and that the trustees were liable to repay such amount to the assignee (*m*).

10. Ademption of Legacies.

The term ademption is used in two entirely distinct senses.

(1) As employed with reference to general legacies it is used where the claims of the legatee to the legacy are in equity deemed to be barred by a portion subsequently given him by the testator.

(*i*) *Re Coleman*, *supra*; cf. *Re Ashby*, [1892] 1 Q. B. 872, 877.
(*k*) *R.* v. *Judge of County Court, etc.*, 20 Q. B. D. 167.
(*l*) 62 L. T. 649; and see *Re Fitzgerald*, [1904] 1 Ch. 573, 593.
(*m*) And cf. *Re Ashby*, [1892] 1 Q. B. 872; *Re Fitzgerald*, *supra*.

This only applies where the testator stands *in loco parentis* to the legatee and rests upon a presumed intention that the portion was given in satisfaction of the legacy.

(2) As employed with reference to specific legacies it denotes the fact that a specific legacy is as a general rule extinguished by its subject-matter ceasing to exist or losing its identity by being converted into a new form. Thus a legacy of specific chattels will be adeemed upon their total loss or destruction during the life of, or at the same time as the death of, the testator, even though they may have been insured, and their value recovered from the insurers, for the insurance money will vest in the executors as part of the residuary estate (*n*).

The mere republication of a will (*o*), or the confirmation of a will by a codicil, will not revive a legacy adeemed in the interval (*p*).

Ademption here (unlike ademption by way of satisfaction) is in no way dependent upon the intention of the testator; it is a legal consequence of the change in identity of the subject-matter (*q*). When the change is, however, caused by the illegal or unauthorised acts of third persons there will be no ademption. Thus where stock specifically bequeathed has been transferred by fraud or other tortious act, unknown to the testator (*r*), or without his consent (*s*), or if he die before the authority given to his agents to make a change of investment has been carried into effect (*t*)—in all these cases there will be no ademption.

As a general rule, the unauthorised acts of parties will not effect a conversion so as to disappoint the specific legatees of a person who became insane after making his will (*u*).

Where personal property, specifically bequeathed by a person who afterwards became a lunatic, was sold under an order of the Court of Chancery in Lunacy, which did not preserve the rights of the legatees, it was held that the bequest was adeemed (*x*). But in such a case ademption would now be prevented from taking place

(*n*) *Durrant* v. *Friend*, 5 De G. & Sm. 343.

(*o*) *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623; *Monck* v. *M.*, 1 Ball. & B. 298.

(*p*) *Cowper* v. *Mantell*, 22 B. 223; and see *Montague* v. *M.*, 15 B. 565; *Sidney* v. *S.*, 17 Eq. 65, 68; *Hopwood* v. *H.*, 7 H. L. Cas. 728.

(*q*) *Stanley* v. *Potter*, 2 Cox, 180; *Re Slater*, [1907] 1 Ch. 655, at p. 671.

(*r*) *Shaftesbury* v. *S.*, 2 Vern. 747, 748 (n. 2); *Domvile* v. *Taylor*, 32 B. 604

(*s*) *Basan* v. *Brandon*, 8 Si. 171.

(*t*) *Ibid.*; *Harrison* v. *Asher*, 2 De G. & Sm. 436.

(*u*) *Taylor* v. *T.*, 10 Ha. 475; *Jenkins* v. *Jones*, 2 Eq. 323; *Re Larking*, 37 Ch. D. 310; and see *Browne* v. *Groombridge*, 4 Madd. 495.

(*x*) *Jones* v. *Green*, 5 Eq. 555.

by section 123 of the Lunacy Act, 1890. In *Re Walker* (*y*) the testator gave all his investments to A and the residue of his estate to B. After the date of the will the testator became of unsound mind, and under an order of the Court £500 (which at the date of the will was in the hands of agents of the testator) was invested in India Stock. It was held that section 123 of the Lunacy Act, 1890, did not apply and that the India Stock passed, with the rest of the testator's investments, to A and not to B.

Specific Legacies of Goods in a particular House or Place.

If the goods are removed during the life of the testator from the house or place named in the will, the question whether the legacy is or is not adeemed would now seem to depend upon whether the mention of the house or place is simply for the identification of the goods bequeathed, or whether the enjoyment of the goods is connected with the user of the house. In the former case removal will not cause ademption (*z*), in the latter case, if the removal is permanent and authorised by the testator there will be ademption. If the bequest is of certain goods which shall be in a certain place at the testator's decease, permanent removal will again adeem the legacy (*a*).

A mere temporary or accidental removal may not amount to an ademption. In *Land* v. *Devaynes* (*b*) a testator gave all his plate and linen in his house in S. (with the lease) to his wife. He had but one set of plate and linen, which was usually removed, with the family, from house to house. The plate happened to be at B., the country house, at his death, yet it passed to the wife.

A bequest of household furniture, pictures, and books, which might be at the testator's decease in, upon, or about his mansion, passed pictures removed from the mansion, and in the hands of a picture-cleaner to be cleaned, and books sent to be repaired, but not articles purchased for the mansion, and not sent home at the testator's decease (*c*).

So ademption has been held not to take place by the removal for

(*y*) [1921] 2 Ch. 63.

(*z*) *Cunningham* v. *Ross*, 2 Cas. temp. Lee, 272; *Norris* v. *N.*, 2 Coll. C. C. 719; *Norreys* v. *Franks*, 9 Ir. R. Eq. 18; *Re Dennis*, 24 T. L. R. 499.

(*a*) *Shaftesbury* v. *S.*, 2 Vern. 747; *Heseltine* v. *H.*, 3 Madd. 276; *Colleton* v. *Garth*, 6 Si. 19; *Spencer* v. *S.*, 21 B. 548; *Blagrave* v. *Coore*, 27 B. 138; and see *Green* v. *Symonds*, 1 Bro. Ch. 129 (n.).

(*b*) 4 Bro. Ch. 537.

(*c*) *Lord Brooke* v. *Earl of Warwick*, 2 De G. & Sm. 425.

safe custody of jewellery (*d*) or plate to a banker's (*e*); or of furniture and other articles to a warehouse (*f*). But in *Re Baroness Zouche* (*g*) a testatrix made a bequest of "the furniture, pictures, plate, articles of virtu and curiosities at Parham House at the time of my decease." At the testatrix's death a quantity of plate belonging to her was at her bankers for safe custody. It had been placed at the bank some years before by the testatrix's predecessor in title, when the house was let furnished, and had been allowed to remain after the tenancy determined. The testatrix also owned some rare books and MSS. which had been lent to the British Museum for exhibition and which were still there when she died. It was held by P. O. Lawrence, J., that neither the plate at the bank nor the books and MSS. at the British Museum passed under the specific bequest.

It seems that ademption will not take place if the goods are removed on account of a fire. "They should be considered," says Lord Hardwicke, "as being in the testator's house at his death, and the legacy is not defeated by that accident" (*h*).

Specific Legacies of Debts.

If a *debt*, specifically bequeathed, be received by the testator, whether it is paid voluntarily or under compulsion, it will be adeemed, for there exists nothing for the will to operate upon (*i*), and a partial receipt of a debt will, as was held by Lord Thurlow, in the principal case, only be an ademption *pro tanto* (*k*).

So a bequest of policies effected upon the life of another person by the testator will be adeemed by his receipt of the sums insured upon the death of such person, although the sums so received may have been invested on securities in existence at the testator's death (*l*).

A specific bequest of a debt due on mortgage will be adeemed by the receipt thereof, although the money may have been re-

(*d*) *Re Johnston*, 26 Ch. D. 538, 551.
(*e*) *Domvile* v. *Taylor*, 32 B. 604.
(*f*) *Ibid.*
(*g*) [1919] 2 Ch. 178.
(*h*) *Chapman* v. *Hart*, 1 Ves. Sen. 271.
(*i*) *Rider* v. *Wager*, 2 P. W. 329, 330, 331; *Birch* v. *Baker*, Mos. 373; *Badrick* v. *Stevens*, 3 Bro. Ch. 431; *Stanley* v. *Potter*, 2 Cox, 180; *Fryer* v. *Morris*, 9 V. 360; *Aston* v. *Wood*, 43 L. J. Ch. 715.
(*k*) *Jones* v. *Southall*, 32 B. 31; *Makeown* v. *Ardagh*, 10 Ir. R. Eq. 445; cf *Toole* v. *Hamilton*, [1901] 1 Ir. R. 383.
(*l*) *Barker* v. *Rayner*, 5 Madd. 208; 2 Russ. 2 Russ. 122

invested in a mortgage not paid off at the time of the testator's death (*m*). And it has been held to be immaterial that the testator, after receiving the mortgage debt, has placed the amount to his separate account at a banker's, and has put the pass book, in which the account was credited, into the hands of the specific legatee of the debt (*n*). A specific legacy of a debt to the debtor will be adeemed by its payment, although the debtor may have incurred a fresh debt to the testator at the time of his death (*o*).

Forgiveness of a debt is a specific legacy of the amount of the debt (*p*). On a release by will to the debtor of the interest due on a specific debt up to the death of the testator it was held a specific legacy of the interest on that debt; and adeemed by payment, although interest be due upon a new debt owing to the testator at the time of his death (*q*). But in *Everett* v. *E.* (*r*), after a recital that a son was "now indebted," a release from the said moneys and "all other moneys due from him" was held to speak from the testator's death, and release debts accrued since the will and a codicil.

Specific Legacy of Stock, etc.

Where, as in the principal case, *stock* specifically bequeathed has subsequently been either wholly or partially sold out by the testator, the legacy will be adeemed either wholly or *pro tanto* (*s*).

So where *stock* is standing *in the name of a trustee* at the time a testator makes a specific bequest of it, but is afterwards transferred to and sold out by him, and cannot be traced, being spent or mixed with his other moneys, the legacy will be adeemed (*t*); but where a testator makes a specific bequest of such stock, it will not be adeemed by a transfer after the date of the will, into his own name (*t*).

Where stock specifically bequeathed is sold and the same or a less amount of the same stock is subsequently purchased by the

(*m*) *Gardner* v. *Hatton*, 6 Si. 93; *Phillips* v. *Turner*, 17 B. 194; *Sidebotham* v. *Watson*, 11 Ha. 170; *Gale* v. *G.*, 21 B. 349; *Jones* v. *Southall*, 32 B. 31.

(*n*) *Re Bridle*, 4 C. P. D. 336.

(*o*) *Smallman* v. *Goolden*, 1 Cox, 329, applied in *Sidney* v. *S.*, 17 Eq. 67; cf. *Everett* v. *E.*, 7 Ch. D. 428, 432.

(*p*) *Re Wedmore*, [1907] 2 Ch. 277.

(*q*) *Sidney* v. *S.*, 17 Eq. 65.

(*r*) 7 Ch. D. 428.

(*s*) See *Sleech* v. *Thorington*, 2 Ves. Sen. 562; *Drinkwater* v. *Falconer*, 2 Ves. Sen. 623; *Humphreys* v. *H.*, 2 Cox, 184; *Birch* v. *Baker*, Mos. 373.

(*t*) *Lee* v. *L.*, 27 L. J. Ch. 824.

testator, the legacy adeemed by the sale will not be revived by the purchase, for ademption does not depend upon the testator's intention. The question will be, Is the identical stock bequeathed by the testator in existence? And if that question is answered, as in such case it must be, in the negative, the legacy is adeemed (*u*).

Where, however, the thing specifically given has been changed in name and form only, and is in existence substantially the same, though in a different shape, at the time of the testator's death, it will not be considered as adeemed by such a nominal change (*x*).

Upon this principle, where a testator had bequeathed all his Great Western Railway shares, and all other the railway shares, which he might be possessed of at the time of his decease : it was held by Turner, V.-C., that the bequest was not adeemed, in consequence of the Great Western shares which the testator had at the date of his will having been converted, by a resolution of the company under the authority of an Act of Parliament, into consolidated stock (*y*). On the other hand, a legacy of the interest arising from money invested in (*inter alia*) stock of the Lambeth Waterworks Company was held adeemed where between the date of the will and the testator's death the undertaking of the Lambeth Waterworks Company was acquired by the Metropolitan Water Board under an Act of Parliament, and a sum of Metropolitan Water Board Stock had been issued to the testator as compensation for the stock held by him at the date of his will in the Lambeth Waterworks Company (*z*). The principle in *Oakes* v. *O.*, *supra*, did not apply, for there was " an absolute annihilation or extinction of the interests in the Lambeth Waterworks Company, and a compensation awarded in the shape of an allotment of different stock in a different concern on a different footing altogether " (*a*).

So also where a testator having certain debentures at the date of his will, thereby gave them upon certain trusts, and after the date of the will exercised an option given to him by the company who had issued the debentures, and converted them into the *debenture stock* of the same company, it was held that the debenture stock did not pass by the will (*b*).

(*u*) *Re Gibson*, 2 Eq. 669; *Pattison* v. *P.*, 1 My. & K. 12; *Harrison* v. *Jackson*, 7 Ch. D. 339; *Macdonald* v. *Irvine*, 8 Ch. D. 101; and see *Re Lane*, *infra*.

(*x*) *Oakes* v. *O.*, 9 Ha., at p. 672; *Re Clifford*, [1912] 1 Ch. 29; *Re Leeming*, [1912] 1 Ch. 828.

(*y*) *Oakes* v. *O.*, *supra*.

(*z*) *Re Slater*, [1907] 1 Ch. 665.

(*a*) *Ibid.*, at p. 675.

(*b*) *Re Lane*, 14 Ch. D. 856; cf. *Re Slater*, [1907] 1 Ch. 665, 676; *Re Herring*, [1908] 2 Ch. 493, 499.

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If a *partner*, under articles providing for the renewal of the partnership, specifically bequeath his *share of the profits* (naming the amount), and upon the expiration of the old, new articles are entered into, by which his share in the profits is altered, the legacy will not be adeemed. In *Backwell* v. *Child* (*c*) Lord Hardwicke observed, "Where a person *in trade* makes a provision out of his share for his family, and afterwards renews the partnership, by which, perhaps, his interest is varied, yet it is not a revocation; if it were, it would occasion great confusion."

Leaseholds.

Where the words of a specific bequest refer expressly to the leasehold interest which the testator *then has* in certain property, the legacy will be adeemed, if the testator subsequently surrender the lease in terms bequeathed, and take a new lease of the same property (*d*), unless perhaps the testator is merely a *cestui que trust* of the lease, the legal estate therein being vested in a trustee (*e*).

If the testator assigns or enters into a valid contract for the sale of the leasehold interest thus specifically bequeathed, the legacy will of course be adeemed (*f*).

Where, after a testator has bequeathed leaseholds, he has been served by a railway company with notice to treat for the purchase, which has been followed by a valuation of the surveyors, as that will amount to a valid contract to sell the leaseholds to the railway company, the bequest will be adeemed. The legatee, however, will be entitled to the rents of the leaseholds accruing due between the death of the testator and the completion of the purchase by the company (*g*).

As a testator may undoubtedly dispose of the *future*, as well as his present interest in a chattel real, it is a question of intention to be collected from the words used, what the subject of disposition is—whether only the interest in the premises which he had at the

(*c*) Amb. 260; and see *Re Russell*, 19 Ch. D. 432.

(*d*) *Abney* v. *Miller*, 2 Atk. 593; *Rudstone* v. *Anderson*, 2 Ves. Sen. 418; *Hone* v. *Medcraft*, 1 Bro. Ch. 261; *Slatter* v. *Noton*, 16 V. 197.

(*e*) *Carte* v. *C.*, 3 Atk. 174; *S. C.*, Amb. 28; Ridgw. Ca. t. Hard. 210; *Slatter* v. *Noton*, *supra*.

(*f*) *Strode* v. *Lady Falkland*, 2 Vern. 621; *Yardley* v. *Holland*, 20 Eq. 428.

(*g*) *Watts* v. *W.*, 17 Eq. 217.

time of executing the will, or all the interest, though subsequently acquired, which he might have at his death (*h*).

If, for instance, a testator leaves "all the term and interest which I *shall have* to come in land held by me under a lease from A" (*i*), or where the old lease contains a covenant for renewal by the lessor, and the lessee bequeaths "all my right and interest *under* or *by virtue* of the lease," any future interest will pass, and a partition has been held not to amount to an ademption or revocation of a previous devise of a share thereof (*k*). Similar rules apply to the bequest of an under lease (*l*).

Section 23 of the Wills Act, 1837, enacts "that no conveyance or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death" (*m*).

Where a testator has made a specific bequest of leaseholds, showing that he intended to describe the property and to give to the legatee any interest that he might have therein, the gift will not be adeemed by the subsequent purchase of the fee by the testator, which, in the absence of a contrary intention expressed in the will, will pass to the legatee (*n*).

Where, however, a testator, after devising a rent-charge of £15 issuing out of a certain house, purchased for £43 15s. 0d. (being the amount of the arrears due in respect of the rent-charge) the fee simple of such house, the conveyance expressly stating that the rent-charge should merge in the fee simple, it was held that section 23 did not apply, and that the gift of the rent-charge had been adeemed (*o*).

(*h*) *Slatter* v. *Noton*, 16 V., at p. 198. And see *Colegrave* v. *Manby*, 6 Madd. 72, 84.

(*i*) *James* v. *Dean*, 11 V. 383, 389; 15 V. 236; *Abney* v. *Miller*, 2 Atk. 593; *Colegrave* v. *Manby*, *supra*.

(*k*) *Woodhouse* v. *Okill*, 8 Si. 115.

(*l*) *Porter* v. *Smith*, 16 Si. 251.

(*m*) See Carson, R. P. Statutes (3rd ed.), p. 519; *Moor* v. *Raisbeck*, 12 Si. 123, 139; *Blake* v. *B.*, 15 Ch. D. 481, 487; *Re Clowes*, [1893] 1 Ch. 214; *Re Bick*, [1920] 1 Ch. 488.

(*n*) *Struthers* v. *S.*, 5 W. R. 809; *Miles* v. *M.*, 1 Eq. 462; *Cox* v. *Bennett*, 6 Eq. 422; *Wedgwood* v. *Denton*, 12 Eq. 290; *Saxton* v. *S.*, 13 Ch. D. 359; *sed vide Emuss* v. *Smith*, 2 De G. & Sm. 722.

(*o*) *Re Bick*, [1920] 1 Ch. 488.

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Powers.

Where property subject to a power of appointment has been changed after the date of a will exercising the power, the question may arise whether there has been ademption. If the testator has used words showing his intention that the property into whatever form it may be changed shall pass, then there is no ademption, but if he has specifically described the property, then only property answering that description will pass (*p*).

Where a testator, having given a general legacy, by a subsequent instrument makes it specific, the ademption of the specific legacy without more, will not set up the general legacy (*q*).

Demonstrative Legacies.

A *demonstrative legacy* is not liable to ademption, although the fund out of which it is payable be not in existence at the death of the testator; the primary object is the gift of the legacy; the fund out of which it is payable is merely of secondary consideration. "Thus," as observed by Lord Macclesfield, "if a legacy was given to J. S., to be paid *out* of such a particular debt, and there should not appear to be any such debt, or the fund fail, still the legacy ought to be paid, and the failing of the modus appointed for payment should not defeat the legacy itself" (*r*).

Where, however, a testator shows it to be his intention that a legatee is to be paid out of a particular fund *only*, upon its failure he will have no claim upon the general assets (*s*).

In *Kermode* v. *Macdonald* (*t*), where a specific legacy of £300 of particular investments and a pecuniary legacy of £200 were given, followed by a direction that if the personal estate were insufficient for legacies the deficiency should be made up out of real estate, and by a codicil all the personal estate was given to another person, it was held that the specific legacy was adeemed, but the the pecuniary legacy remained a charge on the real estate.

(*p*) *Beddington* v. *Baumann*, [1903] A. C. 13; affirming *Re Moses*, [1902] 1 Ch. 100; *Re Dowsett*, [1901] 1 Ch. 398; and see *Gale* v. *G.*, 21 B. 349; *Blake* v. *B.*, 15 Ch. D. 481; *Collinson* v. *C.*, 24 B. 269; *Re Johnstone's Settlement*, 14 Ch. D. 162.

(*q*) *Hertford* v. *Lowther*, 7 B. 107.

(*r*) *Savile* v. *Blacket*, 1 P. W. 777—779; and see *Ellis* v. *Walker*, Amb. 309; *Chaworth* v. *Beech*, 4 V. 555; *Gillaume* v. *Adderley*, 15 V. 384; *Smith* v. *Fitzgerald*, 3 V. & B. 5; *Mann* v. *Copland*, 2 Madd. 223; *Fowler* v. *Willoughby*, 2 S. & S. 354; *Willox* v. *Rhodes*, 2 Russ. 452; *Campbell* v. *Graham*, 1 Russ. & M. 453; *Creed* v. *C.*, 11 Cl. & Fin. 491; *Williams* v. *Hughes*, 24 B. 474.

(*s*) *Coard* v. *Holderness*, 22 B. 391; and see *Bristow* v. *B.*, 5 B. 289.

(*t*) 1 Eq. 457; L. R. 3 Ch. 584. And see *Sheddon* v. *Goodrich*, 8 V. 481, 501.

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11. Nature and Incidents of Specific Legacies.

Exoneration from Liabilities.

A specific legacy, as is laid down in the principal case, will not be adeemed by the testator pledging or pawning it, and the legatee was entitled, prior to the Administration of Estates Act, 1925, to require the amount owing under the pledge to be paid off by the executor out of the general estate, Locke King's Acts not applying to pure personal estate (*u*).

But a specific legatee is not entitled to have the legacy redeemed or freed from the charge when the charge upon it is really not in strictness an incumbrance, but something incident to the nature of the thing (*x*), as in the case of liabilities arising on covenants contained in leases or through calls being made on shares partly paid up.

The Administration of Estates Act, 1925, repeals Locke King's Act and the amending Acts, and provides (*y*), in effect, that where a person dies possessed of, or by will disposes of an interest in property which at the time of his death is charged with the payment of money, then (in the absence of a contrary intention) the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for payment of the charge, every part of such interest, according to its value, bearing a proportionate part of the charge on the whole.

Liability of Specific Legatee of Leaseholds.

The obligation of completing the testator's interest in the subject-matter of a bequest, *e.g.*, a leasehold, falls (or prior to the Administration of Estates Act, 1925, fell) upon the testator's general estate, but liabilities arising under the lease after the testator's death must be discharged by the legatee (*z*). Thus all obligations antecedent and preparatory to the complete establishment of the relation of tenant and landlord had to be borne by the general estate (*a*), including all fines and liabilities under cove-

(*u*) *Knight* v. *Davis*, 3 My. & K. 358; *Ellis* v. *Eden*, 25 B. 482; *Bothamley* v. *Sherson*, 20 Eq. 304, 314.

(*x*) *Re Pearce*, [1909] 1 Ch. 819 (upkeep of a yacht specifically bequeathed); and see *Re De Sommery*, [1912] 2 Ch. 622. (*y*) Section 35.

(*z*) See *Armstrong* v. *Burnet*, 20 B. 424, and Lord Macnaghten's statement and criticism of the cases in *Eccles* v. *Mills*, [1898] A. C., at p. 373.

(*a*) *Marshall* v. *Holloway*, 5 Si. 196, as explained in *Armstrong* v. *Burnet*, *supra*, and *Eccles* v. *Mills*, *supra*; *Fitzwilliams* v. *Kelly*, 10 Ha. 266.

nants which had arisen before or existed at the date of the testator's death (*b*).

On the other hand, following the maxim *qui sentit commodum sentire debet et onus* (*c*), liabilities under covenants to pay rent and outgoings becoming due after the testator's death must be borne by the specific legatee (*d*).

In *Re Courtier* (*e*), the testator bequeathed the residue of his estate, which consisted principally of leasehold houses, some of which were let on short terms and let to weekly tenants, upon trust for his wife for life and after her death for sale—the proceeds to be divided among four persons. The houses were in a bad state of repair at the testator's death, and it was held by the C. A. that the widow was not bound to do more than keep them in the state of repair they were in at the testator's death. In *Re Betty* (*f*), it was held by North, J., that an equitable tenant for life of leaseholds was bound as between himself and the testator's general estate to perform the tenant's continuing liabilities under the lease, although not liable for repairs necessary at the commencement of his interest or in respect of breaches of covenant which had arisen before the testator's death. And in *Re Parry and Hopkin* (*g*) the same learned Judge held that the specific legatee for life of leaseholds is not liable to the remainderman for permissive waste. In *Re Gjers* (*h*), however, it was held by Kekewich, J., following *Re Betty*, that a specific legatee for life of leaseholds was bound, during the continuance of her interest, as between herself and the testator's estate, to pay the rent reserved by the lease and to perform the covenants and conditions. In this case the repairing and other covenants had been duly performed up to the time of the testator's death.

Where a testator bequeaths a policy of assurance on the life of another to persons in succession, it seems that the proper mode of paying the premiums would be to raise them by way of charge upon the policy, so that those who would eventually become

(*b*) *Fitzwilliams* v. *Kelly*, *supra*; *Re Betty*, [1899] 1 Ch. 821.
(*c*) *Kingham* v. *K.*, [1897] 1 Ir. R. 170.
(*d*) *Ledger* v. *Stanton*, 2 J. & H. 687; *Hawkins* v. *H.*, 13 Ch. D. 470, 473.
(*e*) 34 Ch. D. 136.
(*f*) [1899] 1 Ch. 821.
(*g*) [1900] 1 Ch. 160.
(*h*) [1899] 2 Ch. 54.

entitled to the benefit of the policy would bear the burden to the extent of their respective interests (*i*).

Liability for Calls on Shares.

In *Armstrong* v. *Burnet* (*k*), Romilly, M.R., dealing with the liability to pay calls, after reviewing the cases, stated the law in the following terms : " Where the interest of the testator in the subject-matter which he professes to bequeath is complete, or where it is so treated and considered by him and by all persons unconnected with it, as in the case of a share in an insurance company, then the future calls fall on the legatee and not on the general personal estate; [but where further payments are required to make perfect the interest which the testator professes specifically to bequeath, then the general personal estate is applicable for that purpose]."

The words set out above within brackets must be read with the qualification introduced by section 35 of the Administration of Estates Act, 1925. In cases not governed by this Act, if shares not fully paid up are specifically bequeathed, the question whether the specific legatee or the residuary estate is liable to the future calls, depends on the fact whether the calls are actually made before the testator's death; for calls made after death the specific legatee is liable (*l*).

Where shares which form part of a residue bequeathed as one entire fund in trust for one for life are specifically bequeathed over on the death of the tenant for life, it has been held that the specific legatees are not liable for calls made during the life of the tenant for life, but that the calls are payable out of residue, the test being whether the shares have or have not been separted from the general residue at the date of the call (*m*).

Right to Subject-Matter and Profits.

Where executors improperly detain a specific legacy, the legatee will not be allowed to suffer from its depreciation. Suppose,

(*i*) *Macdonald* v. *Irvine*, 8 Ch. D. 101, 120.

(*k*) 20 B. 424, 437; and see *Marshall* v. *Holloway*, 5 Si. 196; *Wright* v. *Warren*, 4 De G. & Sm. 367; *Barry* v. *Harding*, 1 Jo. & Lat. 475; *Fitzwilliams* v. *Kelly*, 10 Ha. 266. See these cases discussed in *Eccles* v. *Mills*, [1898] A. C., at p. 373.

(*l*) *Armstrong* v. *Burnet*, *supra*; *Addams* v. *Ferick*, 26 B. 384; *Day* v. *D.*, 1 Dr. & Sm. 261.

(*m*) *Re Box*, 1 Hem. & M. 552.

for instance, a horse were bequeathed to A, and the executors were to keep the horse until he were worn out, and then offer him to A, he would not be obliged to take him, as he would be entitled to the value of the horse from the time when the horse was used for any purpose, just in the same way as, " if the horse had been sold and the price applied to the debts, the legatee must have been entitled to the value with interest from the moment it was used for any other purpose " (*n*).

Upon the same principle, where a debt due on a promissory note was specifically bequeathed, and the executors, thinking that the legacy was a pecuniary one, instead of delivering the promissory note to the legatee, called in the debt, and the money was paid into Court, and invested in the purchase of stock, which afterwards became depreciated in value, Lord Alvanley held that the legatee was entitled to the sum due upon the note at the time it was paid into Court, with interest at £4 per cent. from that time. " The legatee," said his Lordship, " had a right to the specific legacy. If the assets did not want it, she had a right to have it delivered up. She was not bound to lay it out in the funds : if she had done so, she would have a right to the rise, and be liable to the fall. Instead of that, the executors insisting it should not go out of Court, it was paid in and laid out in stock. It is no more than the case that was put in argument of a legacy of a horse, which the executors refused to let go, lest there should be a deficiency of assets, and having used and worked the horse a considerable time afterwards offered to return him; the legatee then may insist upon the value " (*o*).

So if the bequest were of specific stock, and it happened to be sold out by the executor, when there was no necessity for the sale to pay debts, the equity of the legatee is to have the stock replaced according to its value at the end of a year next after the testator's death, since the fund, if not sold, ought then to have been transferred to the legatee (*p*).

Since the specific legacy is regarded as set apart at the testator's death, all interest and income arising therefrom after that date goes to the legatee (*q*). On the same principle it was held to be right and fair that the specific legatee should be charged with the costs

(*n*) *Chaworth* v. *Beech*, 4 V., at p. 563.
(*o*) *Ibid.* 567
(*p*) *Morley* v. *Bird*, 3 V. 629.
(*q*) *Saunders' Case*, 5 Rep. 12a.

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of the upkeep, care, and preservation of a yacht specifically bequeathed from the time of death until the executors assented (*r*).

The gift of "the amount of a bond I hold" will carry the interest accrued due thereon during the life of the testator (*s*); but the interest will not pass where the gift is confined to the principal, as where the testator gives £300, due upon a bond (*t*).

Moreover, as a general rule, not only interest or dividends but also bonuses which accrue due after the death of a testator, upon shares specifically bequeathed by him, belong to the specific legatee (*u*); even although they may arise in consequence of the fraudulent retention of moneys which would have increased the dividends of any former owner, whether he be the testator or any person taking from him (*x*).

But where a dividend or bonus on shares has been declared during the life of the testator, it will not pass to the specific legatee, although payable after the death of the testator (*y*).

Upon the same principle, the profits of a partnership made during a conventional period, which was wholly included in the testator's lifetime, will be considered to be capital belonging to the testator's estate, although these profits were not ascertained till some time after his death (*z*).

But where the dividends, although earned during the testator's life, are not declared until after his death, they will be considered as income (*a*).

So, likewise, the profits of a partnership, though principally earned during the testator's life, will be considered as income, if the conventional period at which such profits are to be ascertained terminates after the testator's death (*b*).

The rule in *Bouch* v. *Sproule* (*c*) is "When a testator or settlor directs or permits the subject of his disposition to remain as shares

(*r*) *Re Pearce*, [1909] 1 Ch. 819; and see *Re De Sommery*, [1912] 2 Ch. 622, 628.

(*s*) *Harcourt* v. *Morgan*, 2 Keen, 274.

(*t*) *Roberts* v. *Kuffin*, 2 Atk. 112; *Hawley* v. *Cutts*, 2 Freem. 24 (Hov. ed.)

(*u*) *Maclaren* v. *Stainton*, 3 De G. F. & J. 202.

(*x*) *Edmondson* v. *Crosthwaite*, 34 B. 30; *The Carron Co.* v. *Hunter*, L. R. 1 H. L. Sc. 362.

(*y*) *Lock* v. *Venables*, 27 B. 598; *De Gendre* v. *Kent*, 4 Eq. 283; Theobald (8th ed.), p. 199.

(*z*) *Browne* v. *Collins*, 12 Eq. 586, 593. And see *Ibbotson* v. *Elam*, 1 Eq. 188; 35 B. 594.

(*a*) *Bates* v. *Mackinley*, 31 B. 280.

(*b*) *Ibbotson* v. *Elam*, 1 Eq. 188; *Browne* v. *Collins*, 12 Eq. 586; *Gow* v. *Forster*, 26 Ch. D. 672; Theobald (7th ed.), p. 184.

(*c*) 12 A. C. 385, at p 397.

or stocks in a company which has the power either of distributing its profits as dividend or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settlor in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital " (*d*).

The tenant for life is accordingly entitled to all payments out of profits made by the company unless they have been *validly* capitalised by the company by resolution or otherwise (*e*).

Where trustees who are shareholders are given an option between taking profits as dividends or as new shares, it is a question of fact whether the company intended to capitalise the profits or distribute them as dividends. If the company had the latter intention and new shares are taken by the trustees, the tenant for life will be entitled only to so much of the value of the new shares as represents the dividend applied in taking them up, the balance being treated as capital (*f*).

After a company has gone into liquidation the power to declare a dividend is gone, and the surplus assets must be distributed as capital (*g*).

Where the company has no power to increase its capital but has actually employed profits which have accumulated as part of its working capital and then proceeds to distribute the whole or part of such profits among the members, sums so distributed are capital and not income (*h*).

Where shares had been specifically bequeathed to A for life, and two days before his death a dividend was declared (the same being payable some weeks later), it was held that the personal representatives of the tenant for life were entitled to the dividend (*i*).

(*d*) See also *Re Hopkins' Trusts*, 18 Eq. 697; *Re Malam*, [1894] 3 Ch. 578; *Re Evans*, [1913] 1 Ch. 23; *Re Speir*, [1924] 1 Ch. 359; *Re Taylor*, [1926] Ch. 923.

(*e*) *Re Piercey*, [1907] 1 Ch. 289, at p. 294; *Re Thomas*, [1916] 1 Ch. 383; [1916] 2 Ch. 331.

(*f*) *Re Malam*, [1894] 3 Ch. 578; *Re Northage*, 60 L. J. Ch. 488; *Re Tindal*, 9 T. L. R. 24; and see *Rowley* v. *Unwin*, 2 K. & J. 138; *Re Anson*, [1907] 2 Ch. 424; *Re Taylor*, [1926] Ch. 923.

(*g*) *Re Armitage*, [1893] 3 Ch. 337; and see *Inland Revenue Commissioners* v. *Burrell*, [1923] 2 K. B. 478; [1924] 2 K. B. 52.

(*h*) See *Bouch* v. *Sproule*, 12 A. C. 385, at pp. 393, 397.

(*i*) *Wright* v. *Tuckett*, 1 J. & H. 266.

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12. Apportionment Act, 1870.

Ordinarily the income arising from personalty specifically bequeathed as well as property comprised in a residuary gift is apportionable under the Apportionment Act, 1870 (*k*), as between the specific legatee and the estate of the testator (*l*).

The Act has been held to apply to the will of a testator who died before the Act came into operation (*m*). A tenant for life, however, may first of all get the benefit of the old law, and his estate may afterwards get the benefit of the new law under the Act (*n*).

The word "dividends" in the Apportionment Act, 1870, includes payments by way of bonus, or surplus profits to the shareholders of a public company, even though such payments may be only occasional, and not strictly periodical (*o*). But a payment, to come within the Act, must be made for or in respect of some definite period (*p*).

The words "trading or other public companies" in section 5 of the Apportionment Act, 1870, include any public company (*q*), but not a private partnership (*r*); but it is not essential that it should be an incorporated company (*s*). The expression "private company" in section 121 of the Companies (Consolidation) Act, 1908, is a convenient way of describing, for the purposes of that Act, a particular class of companies. But a company constituted under the Act as a private company will nevertheless be a "public company" within the meaning of that term in the Apportionment Act (*t*).

The Apportionment Act will be applicable, not only as between tenant for life and remainderman, but also when in certain events an absolute interest is cut down to a life interest (*u*).

(*k*) 33 & 34 Vict. c. 35, ss. 2, 5.
(*l*) *Pollock* v. *P.*, 18 Eq. 329; and see *Att.-Gen.* v. *Daly*, 8 Ir. R. Eq. 595; *Capron* v. *C.*, 17 Eq. 288.
(*m*) *Re Cline's Estate*, 18 Eq. 213; *Patching* v. *Barnett*, 28 W. R. 886; and see *Jones* v. *Ogle*, L. R. 8 Ch. 192.
(*n*) *Lawrence* v. *L.*, 26 Ch. D. 795.
(*o*) *Re Griffith*, 12 Ch D. 655.
(*p*) *Re Jowitt*, [1922] 2 Ch. 442, 446.
(*q*) *Re Lysaght*, [1898] 1 Ch. 115; *Re Oppenheimer*, [1907] 1 Ch. 399.
(*r*) *Re Griffith*, 12 Ch. D. 655.
(*s*) *Ibid.*
(*t*) *Re White*, [1913] 1 Ch. 231.
(*u*) *Clive* v. *C.*, L. R. 7 Ch. 433

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In *Re Clarke* (*x*) a testator after the Apportionment Act, 1870, bequeathed a considerable sum to trustees, such sum to carry interest at four and a half per cent. until the same should be paid and appropriated, upon trust with the consent of his wife, to invest the same in certain specified securities, and pay the annual income of the legacy, and the investments thereof, including in such income the interest payable in respect of such legacy to his wife for life, with remainders over. Interest was paid to the widow up to the day when, pursuant to an order of the Court, the bequeathed sum was invested in stocks, on some of which five months' dividend had then accrued; it was held that the Apportionment Act did not apply, and that the widow was entitled to the whole of the dividends when received upon the purchased stock. But where capital moneys have been invested by trustees in the purchase of stocks on which at the date of investment dividends have been earned and declared but not paid, the tenant for life is not entitled to the dividend, nor will there be an apportionment (*y*).

The provisions of the Act are by section 7 not to extend to any case in which it is or shall be expressly *stipulated* that no apportionment shall take place; so where shares were bequeathed to trustees, on trust for sale with power of postponement, and settled on persons in succession, with a declaration that every share bequeathed by the will, should carry the dividend accruing thereon at the testator's death, and the dividends were payable annually, it was held that there was no apportionment against the trustees, and that the dividend for the year in which the testator died was payable to the tenant for life (*z*).

The stipulation must presumably be contained in the will; a provision in the Articles of Association of the company in which shares are held is not enough (*a*).

The Act apportions liabilities as well as rights; and accordingly the annual sums payable by a bishop in commutation of first fruits and tenths are "periodical payments in the nature of income" within section 2, and therefore apportionable between successive bishops *inter se* (*b*).

(*x*) 18 Ch. D. 160; cf. *Bulkeley* v. *Stephens*, [1896] 2 Ch. 241.

(*y*) *Re Sir Robert Peel's Settled Estates*, [1910] 1 Ch. 389.

(*z*) *Re Lysaght*, [1898] 1 Ch. 115 (C. A.); *Re Meredith*, 67 L. J. Ch. 409; cf. *Re Edwards*, [1918] 1 Ch. 142.

(*a*) *Re Oppenheimer*, [1907] 1 Ch. 399; *Re Muirhead*, [1916] 2 Ch. 181.

(*b*) *Bishop of Rochester* v. *Le Fanu*, [1906] 2 Ch. 513.

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As to apportionment in gifts of residue in succession, see note to *Howe* v. *Lord Dartmouth*.

13. How far Parol Evidence admissible to determine whether Legacies are Specific or not.

Parol evidence of the state and value of a testator's property is not admissible, *save under special circumstances* (*c*), in order to determine whether a legacy is specific or general (*d*).

Where there is a specific bequest parol evidence is admissible to show what property there is answering to the description of it; but if, on that evidence, it appears that there is property correctly answering the description, no evidence can be adduced to show that it was intended to apply to other property (*e*).

If a testator makes a specific bequest of a thing which he once had, but which he had not at the date of the will, evidence is admissible to show how the mistake arose, and the fact that the subject-matter of the bequest had been exchanged for something else before the date of the will, and in such case the legatee will be entitled to a sum of money equal in value to the specific legacy at the death of the testator, although if he had made the exchange after the date of the will the legacy would have been clearly adeemed. In *Selwood* v. *Mildmay* (*f*) the testator gave £1,250, part of his Four per cent. Bank annuities, to his wife for life, and after her decease to several relations. The testator had no such stock at the date of his will, having previously sold it all, and invested the produce in Long annuities. Evidence to prove these facts having been admitted, it was held by Alvanley, M.R., that the legatees of the £1,250 stock were entitled to their legacies out of the testator's personal estate. "It is clear," said his Lordship, "that the testator meant to give a legacy, but he mistook the fund. He acted upon the idea that he had such stock. The distinction is this: if he had had the stock at the time it would have been considered specific, and that he meant that identical stock; and any act of his destroying that subject would be proof of *animus revocandi*, but if it is a denomination, not the identical *corpus*, in

(*c*) See the dissenting judgment of Rigby, L.J., in *Re Grainger*, [1900] 2 Ch., at pp. 768 *et seq.*

(*d*) *Higgins* v. *Dawson*, [1902] A. C. 1, reversing *Re Grainger*, *supra*.

(*e*) *Horwood* v. *Griffith*, 4 De G. M. & G. 700.

(*f*) 3 V. 306; and see *Lindgren* v. *L.*, 9 B. 358; *Goodlad* v. *Burnett*, 1 K. & J. 341; *Findlater* v. *Lowe*, [1904] 1 Ir. R. 519.

that case if the thing itself cannot be found, and there is a mistake as to the fund out of which it is to arise, that will be rectified."

But if the subject-matter of such a bequest had been a ring or a picture and it could not be found, "the Court could not rectify that" (*g*). Where a testatrix gave a legacy of "my piano," which she afterwards sold for a small sum and then purchased another and far more expensive piano, it was held that the legatee took nothing under the bequest (*h*).

Where, however, a testator makes a specific bequest, as for instance of a sum of stock "standing in my name," and has not the stock described, nor any other stock, the legacy altogether fails, even although the testator may have intended to buy such stock but never did (*i*).

14. Abatement of Legacies.

The order for the administration of assets is stated in the notes to *Ancaster* v. *Mayer*, *supra*, and in the First Schedule to the Administration of Estates Act, 1925. But, as between the different beneficiaries claiming under his will, a testator may vary the order of administration in any manner he thinks proper.

Where a testator estimates a specific sum in money and gives definite portions of it, a gift of the rest may be as specific as if he had stated the actual amount. In *Page* v. *Leapingwell* (*k*), the testator devised land upon trust to sell, but not for less than £10,000, and gave legacies thereout amounting to £7,800, and "the overplus monies," to A and B. The estate sold for less than £7,000; Grant, M.R., held that the other legatees ought to abate equally with A and B, his Honour being of opinion that the inference to be drawn from the expressions in the will was that the testator did not mean by the word "overplus" what it usually imports, *viz.*, whatever shall turn out to be the overplus; but that he was contemplating *a certain overplus*, and was making his disposition accordingly. "I conceive," he added, "the true intention to have been that these persons should take as specific legatees; and, therefore, they must abate among themselves" (*l*). And

(*g*) *Selwood* v. *Mildmay*, *supra*.

(*h*) *Re Sikes*, [1927] 1 Ch. 364.

(*i*) *Evans* v. *Tripp*, 6 Madd. 91. And see *Waters* v. *Wood*, 5 De G. & Sm. 717; *Millar* v. *Woodside*, 6 Ir. R. Eq. 546; cf. *Collison* v. *Curling*, 9 Cl. & Fin. 88.

(*k*) 18 V. 463.

(*l*) See also *Laurie* v. *Clutton*, 15 B. 65; *Wright* v. *Weston*, 26 B. 429; *Duncan* v. *D.*, 27 B. 386; *Haslewood* v. *Green*, 28 B. 1; *Elwes* v. *Causton*,

upon the same principle, where a testator, giving the residue of a specific fund, estimates that residue in money the gift of the residue will be specific although the testator sweeps into that residue any future additions to the fund (*m*). But the question is one of intention, to be gathered from the will as a whole, and no hard-and-fast rule can be laid down (*n*).

Where, however, a testator neither knows nor assumes to know the amount of a fund, and after bequeathing certain portions thereof, he makes a bequest of the residue, the latter is not specific (*o*).

So if a fund is given subject to debts, the gift of the residue will not be specific (*p*).

A question sometimes arises between pecuniary and residuary legatees, where there has been a *devastavit* by the executor, whether (there being at the decease a residue of a certain sum) the pecuniary legatees ought not to share the loss proportionably with the residuary legatees. The balance of authority is that they ought not (*q*).

But the case may be varied by the dealings of the pecuniary legatees with the executor, as by suffering their legacies to remain in his hands, and receiving interest thereon, thus making him their debtor; for then they may be considered to have waived their priority under the will, and will only be entitled to have what is left divided between them and the residuary legatees, in the proportion of the amount of their legacies, and of the residue, as it was computed at the death of the testator, with interest on each (*r*). In other words, " If all the legatees have consented that they will have the fund out of which their legacies are payable appropriated as a specific sum, it is the same as if the testator had

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30 B. 554; *Re Jeffery's Trust*, 2 Eq. 68; *Walpole* v. *Apthorp*, 4 Eq. 37; *Miller* v. *Huddlestone*, 6 Eq. 65.

(*m*) *Haslewood* v. *Green*, 28 B. 1; *Walpole* v. *Apthorp*, 4 Eq. 37, *sed vide De Lisle* v. *Hodges*, 17 Eq. 440.

(*n*) Hawkins (3rd ed.), p. 52; *Re Whitrod*, [1926] Ch. 118.

(*o*) See *Williams* v. *Armstrong*, 12 Ir. Eq. R. 356; *Petre* v. *P.*, 14 B. 197; *Vivian* v. *Mortlock*, 21 B. 252; *De Lisle* v. *Hodges*, *supra*; cf. *Re Tunno*, 45 Ch. D. 66. And see *Carter* v. *Taggart*, 16 Si. 423; *Loscombe* v. *Wintringham*, 12 B. 46; *Booth* v. *Alington*, 6 De G. M. & G. 613; *Greenwood* v. *Jemmett*, 26 B. 479; *Baker* v. *Farmer*, L. R. 3 Ch. 537, reversing *S. C.*, 4 Eq. 382.

(*p*) *Harley* v. *Moon*, 1 Dr. & Sm. 623; *Baker* v. *Farmer*, L. R. 3 Ch. 537.

(*q*) See *Fonnereau* v. *Poyntz*, 1 Bro. Ch. 472, 478; *Humphreys* v. *H.*, 2 Cox, 184; *Page* v. *Leapingwell*, 18 V. 466; and *Wilmott* v. *Jenkins*, 1 B. 401; *Re Lyne's Estate*, 8 Eq. 482. Cf. *Dyose* v. *D.*, 1 P. W. 305.

(*r*) *Ex p. Chadwin*, 3 Swans. 380; see and consider *Molloy* v. *French*, 11 Ir. Eq. R. 376.

appropriated it; and if any part of the fund is lost they must all suffer rateably. But unless there is this common consent, we must look to the intention of the testator and to nothing afterwards " (*s*).

Where, moreover, one of several residuary legatees, or next-of-kin, has received his share of the estate of a testator or an intestate, the others cannot call upon him to refund if the estate is subsequently wasted (*t*); but if part of the estate has been previously wasted, the person so paid can be called upon to refund, the rule being that what is available when one is paid, should be equally divisible among all (*u*).

But where one residuary legatee calls upon another to refund, upon the ground of being overpaid, the burden of proof lies upon the person requiring the money to be refunded, to show that the payment was made in excess (*x*).

Where some of the legatees have been paid, and the assets which were sufficient for the payment of the other legatees have neither been applied nor appropriated in a manner equivalent to payment of the legatees, but have been wasted by the trustees, if other assets should unexpectedly fall in, they ought to be first applied in payment of the last-mentioned legatees (*y*).

As a rule, general legacies and annuities stand upon an equal footing, all taking precedence of a residuary gift (*z*), and upon a deficiency of assets, general legacies and annuities must abate rateably, and the onus lies on any legatee or annuitant seeking priority to make out clearly and conclusively that such priority was intended (*a*). But where the testator's intention is clearly to prefer one legatee to another, preference will of course be given (*b*).

And where a testator bequeaths legacies to creditors, when debts have been already satisfied by compositions for less than what was really owing (*c*), or bequeaths money to pay the debts of others (*d*),

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(*s*) *Per* Wood, L.J., in *Baker* v. *Farmer*, L. R. 3 Ch. 541; see as to executors' right to appropriate, *infra*, Note 17.

(*t*) *Peterson* v. *P.*, 3 Eq. 111, 114; *Morris* v. *Livie*, 1 Y. & C. C. C. 380.

(*u*) *Peterson* v. *P.*, 3 Eq. 111, 114; *Re Winslow*, 45 Ch. D. 249.

(*x*) *Peterson* v. *P.*, *supra*. (*y*) *Wilmott* v. *Jenkins*, 1 B. 401.

(*z*) See *Croly* v. *Weld*, 3 De G. M. & G., at p. 995.

(*a*) *Miller* v. *Huddlestone*, 3 Mac. & G. 513; *Thwaites* v. *Forman*, 1 Coll. 409; *Brown* v. *B.*, 1 Keen, 275; and see *Coore* v. *Todd*, 7 De G. M. & G. 520.

(*b*) *Lewin* v. *L.*, 2 Ves. Sen. 415; *Marsh* v. *Evans*, 1 P. W. 668; *Att.-Gen.* v. *Robins*, 2 P. W. 23; *Beeston* v. *Booth*, 4 Madd. 161, 170; *Stammers* v. *Halliley*, 12 Si. 42; *Brown* v. *B.*, 1 Keen, 275; and see *Weir* v. *Chomley*, 1 Ir. Ch. R. 295; *Haynes* v. *H.*, 3 De G. M. & G. 590; *Re Hardy*, 17 Ch. D. 798; *Re Leach*, [1923] 1 Ch. 161.

(*c*) *Coppin* v. *C.*, 2 P. W. 296.

(*d*) *Shirt* v *Westby*, 16 V. 396.

such legacies, being purely voluntary, must abate with other legacies (*e*).

It may be here mentioned that a legacy is not entitled to priority over others because it is given to a wife or child of the testator (*f*); to servants (*g*); charities (*h*); executors for their care and trouble (*i*); or for a mourning ring (*k*); and it must abate with other general legacies. In like manner a legacy of his profit costs to a solicitor trustee does not take priority over other legacies (*l*).

Priority will be given to legatees for life, when it is directed that the legacies on their deaths are to go in payment of other legacies (*m*).

Merely introductory words such as " in the first place," " in the next place," afterwards," will not create any priority over the legacies they precede (*n*).

Where annuities are made payable out of a sum to be set apart for that purpose, and eventually to sink into the residue, if such sum prove insufficient for that purpose, on the death of one of the annuitants, the surviving annuitants will be entitled to have the deficiencies of their annuities satisfied out of the released fund before it sinks into the residue (*o*).

Where legacies and annuities are charged on real estate, the fact that powers of distress and entry are conferred on the annuitants will not give them priority over the legatees (*p*).

As to the valuation and abatement of legacies, where the assets are insufficient, see above, p. 678.

If annuities are given as gifts of specific interests in the real estate, they will not abate with legacies charged on the real estate (*q*).

(*e*) And see *Turner* v. *Martin*, 7 De G. M. & G. 429.

(*f*) *Blower* v. *Morret*, 2 Ves. Sen. 420; *Miller* v. *Huddlestone*, 3 Mac. & G. 526—529; but see *Re Hardy*, 17 Ch. D. 798; 50 L. J. Ch. 241; and see *Re Schweder's Estate*, [1891] 3 Ch. 44, where Chitty, J., dissented from *Re Hardy*.

(*g*) *Att.-Gen.* v. *Robins*, 2 P. W. 25.

(*h*) *Att.-Gen.* v. *Hudson*, 1 P. W. 675.

(*i*) *Ibid.*, and see *Fretwell* v. *Stacy*, 2 Vern. 434; *Heron* v. *H.*, 2 Atk. 171; *Duncan* v. *Watts*, 16 B. 204.

(*k*) *Apreece* v. *A.*, 1 V. & B. 364.

(*l*) *O'Higgins* v. *Walsh*, [1918] 1 Ir. R. 126; *Re Brown*, 62 Sol. Jo. 487; and see *Re White*, [1898] 2 Ch. 217.

(*m*) *Brown* v. *B.*, 1 Keen, 275; *Haynes* v. *H.*, 3 De G. M. & G. 590.

(*n*) *Thwaites* v. *Forman*, 1 Coll. 409; *Beeston* v. *Booth*, 4 Madd. 161; *Whitehouse* v. *Insole*, 7 L. T. 400; *Cazenove* v. *C.*, 61 L. T. 115; *Re Harris*, [1912] 2 Ch. 241. But cf. *Re Leach*, [1923] 1 Ch. 161.

(*o*) *Arnold* v. *A.*, 2 My. & K. 374; and see *Re Richardson*, [1915] 1 Ch. 353. Cf. *Farmer* v. *Mills*, 4 Russ. 86.

(*p*) *Roper* v. *R.*, 3 Ch. D. 714; Theobald (8th ed.), p. 953.

(*q*) *Creed* v. *C.*, 11 Cl. & Fin. 491; and see *Re Briggs*, 29 W. R. 925.

Ashburner v. Macguire.

When the *corpus* of an estate charged with annuities is insufficient to pay the arrears, it will be divided between the annuitants in proportion to the value of their respective annuities (*r*).

If all the annuitants are *living* at the period of division, the value must be ascertained as at the death of the testator (*s*).

If *all* the annuitants are dead, the arrears of their annuities must be ascertained, and the fund divided in the proportion of those arrears (*t*).

If *some* are dead, and the others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments (*u*) : and it is immaterial that an annuity is reversionary and falls into possession some years after the testator's death (*x*).

A bequest of an annuity to an executor for his trouble in the conduct and management of the testator's affairs will not be entitled to priority over other legacies (*y*).

15. To whom Legacies are to be Paid.

Where legatees are *sui juris*, legacies will be payable to them, care being taken that they answer the description given to them in the will. An executor, however, is not justified in paying a legacy left to an *infant* until he comes of age (*z*), unless there is express direction to pay while under age (*a*); nor will a payment thereof to a parent or any other relation (though testamentary guardian) in his behalf be good without the authority of the Court of Chancery (*b*), which has under special circumstances ordered a small legacy belonging to an infant to be paid to the father (*c*); and even in the case of an adult child payment to the father is not good, unless it were made by his consent, or were validated by a subsequent ratification (*d*).

(*r*) *Wroughton* v. *Colquhoun*, 1 De G. & Sm. 357; *Todd* v. *Bielby*, 27 B. 356; cf. *Re Sinclair*, [1897] 1 Ch. 921.

(*s*) *Todd* v. *Bielby*, *supra*; *Re Wilkins*, 27 Ch. D. 703.

(*t*) *Todd* v. *Bielby*, *supra*.

(*u*) *Todd* v. *Bielby*, *supra*; *Heath* v. *Nugent*, 29 B. 226.

(*x*) *Potts* v. *Smith*, 8 Eq. 683; and see *Fielding* v. *Preston*, 1 De G. & J. 438; *Innes* v. *Mitchell*, 2 Ph. 346; *Re Metcalf*, [1903] 2 Ch. 424.

(*y*) *Duncan* v. *Watts*, 16 B. 204.

(*z*) *Philips* v. *Paget*, 2 Atk. 80, 81.

(*a*) *Re Deneker*, [1895] W. N. 28; 72 L. T. 220.

(*b*) *Dagley* v. *Tolferry*, 1 P. W. 285; *S. C.*, *nom. Doyley* v. *Tollferry*, 1 Eq. Ca. Abr. 300; *S. C.*, *nom. Dawley* v. *Ballfrey*, Gilb. Eq. Rep. 103.

(*c*) *Walsh* v. *W.*, 1 Drew. 64.

(*d*) *Cooper* v. *Thornton*, 3 Bro. Ch. 96.

Ashburner v. Macguire.

But where the direction is to pay the legacy to a trustee for a child, or even to his father (who would, thereupon, become a trustee), such payment may be made by the executor (*e*).

An executor may free himself from all liability by paying the legacy of an infant into Court under the Trustee Act, 1925, s. 63. By the definition clause, section 68, sub-section 17, the expressions "trust" and "trustee" extend to implied and constructive trusts and to the duties incident to the office of a personal representative (*f*). An executor could not, before the passing of the Administration of Estates Act, 1925, by appropriating the amount of a pecuniary legacy given to an infant and investing the same in a trustee's investment, render himself free to distribute the residue of the estate without incurring personal liability, and prevent recourse to the residue by the legatee if the fund so created proved insufficient to pay the legacy in full upon the legatee attaining twenty-one (*g*). This difficulty has now been removed by the Administration of Estates Act, 1925 (*h*). Under section 42, sub-section 1 of this Act an executor can appoint trustees in respect of an infant's legacy and obtain a discharge by paying the amount of the same to such trustees.

If a legacy be given to an infant, payable when twenty-one, without intermediate interest, upon the death of the legatee before attaining twenty-one, his administrators will be entitled to the legacy, but they must wait until the time when the legatee would, if he had lived, have been twenty-one (*i*); but if intermediate interest be given, and the legatee die before twenty-one, they will be entitled to immediate payment of the legacy (*k*).

If, however, under similar circumstances, a legacy were payable *at a future day out of land*, with interest in the meantime, upon the death of the legatee before the day of payment, the Court would not direct the legacy to be raised (*l*).

If a legacy be left to A to be paid at twenty-three years of age,

(*e*) *Cooper* v. *Thornton*, 3 Bro. Ch. 96; *Robinson* v. *Tickell*, 8 V. 142.

(*f*) For earlier statutes which gave similar power, see 36 Geo. 3, c. 52, s. 32, and 56 & 57 Vict. c. 53, s. 42. See also *Re Salaman*, [1907] 2 Ch. 46.

(*g*) *Re Salomons*, [1920] 1 Ch. 290.

(*h*) See section 42, sub-section 2.

(*i*) *Anon.*, 2 Vern. 199; *Chester* v. *Painter*, 2 P. W. 336; *Roden* v. *Smith*, Amb. 588; *Crickett* v. *Dolby*, 3 V. 13.

(*k*) *Anon.*, 2 Vern. 199; *Cloberry* v. *Lampen*, 2 Freem. 25 Hov. ed.; *Crickett* v. *Dolby*, 3 V. 13.

(*l*) *Gawler* v. *Standerwick*, 2 Cox, 15; *Parker* v. *Hodgson*, 1 Dr. & Sm. 568; *Evans* v. *Scott*, 1 H. L. C. 43, 57; *Taylor* v. *Lambert*, 2 Ch. D. 18, 177; Theobald (8th ed.), p. 650.

if he die before to go over to B, upon the death of A during minority the legacy will be presently payable to B, who will not be obliged to wait until such time as A would, if he had lived, have been twenty-three (*m*).

When a legatee has been *abroad* for many years without having been heard of, the presumption may be raised by the Court that he is dead (*n*); but in some cases, upon payment of such legacy to the person entitled thereto in the event of the death of the legatee, security to refund, in case the legatee should return home, has been required (*o*).

The executor may, however, under such circumstances take advantage of the provisions of the Trustee Act, 1925, s. 63.

16. Appropriation of Legacies payable in Futuro.

Where a legacy is given payable *in futuro*, as upon the legatee attaining a certain age, or so many years after the death of the testator, the legatee may come into Court, and, without any suggestion of insolvency or wasting of assets on the part of the executor, pray that a sufficient sum be set apart to answer the legacy when it becomes due (*p*); and it is immaterial that the legacy is given on a contingency, upon the failure of the happening of which it is to sink into the residue (*q*). Save where either (1) the legacy, though payable *in futuro*, is vested and certainly payable at a future date; or (2) where the legacy, though contingent, yet carries interest in the meantime, the legatee has no right to insist upon an *appropriation*, nor will he (except in cases governed by section 41 of the Administration of Estates Act, 1925) be affected by an appropriation made by the executor (*r*).

In future, the right of appropriation by an executor or administrator will depend mainly on the *Administration of Estates Act*,

(*m*) *Papworth* v. *Moore*, 2 Vern. 283; and see *Laundy* v. *Williams*, 2 P. W. 479; Theobald (8th ed.), p. 208.

(*n*) *Mainwaring* v. *Baxter*, 5 V. 458; *Dixon* v. *D.*, 3 Bro. Ch. 510; *Re Lewes' Trust*, 11 Eq. 236, affirmed in L. R. 6 Ch. 356; Seton (7th ed.), p. 1590.

(*o*) *Bailey* v. *Hammond*, 7 V. 590; *Cuthbert* v. *Purrier*, 2 Ph. 199; *Dowley* v. *Winfield*, 14 Si. 277; and see *Norris* v. *N.*, Rep. t. Finch, 419; Seton (7th ed.), pp. 1589, 1590.

(*p*) *Ferrand* v. *Prentice*, Amb. 273; *S. C.*, Dick. 568; *Walker* v. *Cooke*, 1 Bro. Ch. 105, cited; *Johnson* v. *Mills*, 1 Ves. Sen. 282; *S. C.*, *nom. Johnson* v. *De la Creuze*, 1 Bro. Ch. 105, cited; *Re Hall*, [1903] 2 Ch. 227; *sed vide Gawler* v. *Standerwick* (as to legacy payable out of land), *supra*.

(*q*) *Green* v. *Pigot*, 1 Bro. Ch. 103; *Carey* v. *Askew*, 2 Bro. Ch. 58; *Pullen* v. *Smith*, 5 V. 21; *Hutcheson* v. *Hammond*, 3 Bro. Ch. 144, 145; *The Governesses' Benevolent Institution* v. *Rushbridger*, 18 B. 467.

(*r*) *Re Hall*, [1903] 2 Ch. 226 (C. A.).

1925, section 41 of which provides (*inter alia*) that a personal representative may appropriate any part of the estate in or towards satisfaction of any legacy bequeathed by the deceased, or of any other interest or share in his property, according to the respective rights of the persons interested; provided that an appropriation is not to be made so as to affect prejudicially any specific devise or bequest, nor is it to be made without the following consents, *i.e.*— (a) when made for the benefit of a person absolutely and beneficially entitled in possession, the consent of that person, and (b) when made in respect of any settled legacy, share or interest, the consent of the trustee, if any (not being also the personal representative), or the person who may for the time being be entitled to the income. If the person whose consent is required is an infant or a lunatic, the consent may be given by his parent, guardian, committee, or receiver. If, independently of the personal representative, there is no trustee of a settled legacy, share or interest, and no person of full age and capacity entitled to the income, no consent is to be required to an appropriation provided that it is of an investment authorised by law or by the will (if any) of the deceased. An appropriation made under the section will bind all persons interested in the property of the deceased whose consent is not thereby made requisite. The words "settled legacy, share or interest" in the section include any legacy, share or interest to which a person is not absolutely entitled in possession at the date of appropriation, and also an annuity. The section applies whether the deceased died intestate or not, and whether before or after the commencement of the Act, and authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise.

The contingent legatee has the right to *security*, not to appropriation (*s*).

Where an annuity is given followed by a direction to set apart a fund to satisfy it or a direction is given to set apart a fund to produce an annuity, and in either case on the expiration of the annuity the fund is directed to fall into residue or is given as part of the residue, the annuity is regarded as charged upon the whole of the personal estate, and if the fund appropriated prove insufficient the annuity is payable out of the *corpus* of the estate (*t*).

(*s*) See *Webber* v. *W.*, 1 S. & S. 311; *King* v. *Malcott*, 9 Ha. 692, 696; and see *per* Cozens-Hardy, L.J., *Re Hall*, *supra*, at p. 235.

(*t*) *May* v. *Bennett*, 1 Russ. 370; *Carmichael* v. *Gee*, 5 A. C. 588; *Gordon* v. *Bowden*, 6 Madd. 342; *Davies* v. *Wattier*, 1 S. & S. 463; *Boyd* v. *Buckle*,

Ashburner v. Macguire.

Where, however, the capital of a fund directed to be provided or set apart to produce an annuity of a certain amount, is after the death of the annuitant specifically disposed of, and is not directed to fall into residue or disposed of as such, the annuitant on a deficiency of the fund cannot claim to have the annuity made up by the residuary estate, or by the *corpus* of the fund (*u*).

If the annuitant clearly assented to the appropriation of some fund to provide for his annuity, and the income of the fund proved insufficient to answer the annuity, it seems that, even independently of the Administration of Estates Act, s. 41, the loss would fall on the annuitant (*x*).

17. (A) Time of Payment of Legacies and Interest. (B) Contingent Legacies and Income. (C) Maintenance under Statute. (D) Rate of Interest. (E) Annuities. (F) Duties.

(A) Time of Payment of Legacies.

Assuming that an executor has paid debts and given his assent, expressed or implied, to a legacy, the question then arises, at what time it becomes payable, and interest thereon begins to run.

Specific Vested Legacies.

These are considered as severed from the bulk of the testator's property by the operation of the will, *from the death* of the testator, and are specifically appropriated, with their increase and emolument, for the benefit of the legatee from that period, the executor's assent thereto being deemed to relate back (*y*). Interest is computed on them *from the death* of the testator; and it is immaterial whether the enjoyment of the principal is postponed by the testator or not. Thus, where there is a specific legacy of stock, the legatee will be entitled to the dividends from the death of the testator (*z*), although it may have been directed "to be paid within twelve calendar months" after the testator's decease (*a*).

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10 Si. 595; and see *Harbin* v. *Masterman*, [1896] 1 Ch. 351; *Re Evan and Bettell's Contract*, [1910] 2 Ch. 438.

(*u*) *Kendall* v. *Russell*, 3 Si. 424; and see *Bague* v. *Dumergue*, 10 Ha. 462; *Baker* v. *B.*, 6 H. L. Cas. 616, 628; *Hickman* v. *Upsall*, 2 Gif. 124.

(*x*) *Arundell* v. *A.*, 1 My. & K. 316.

(*y*) *Saunders' Case*, 5 Rep. 12 (a); and see *Re Pearce*, [1909] 1 Ch. 819.

(*z*) *Barrington* v. *Tristram*, 6 V. 345; *Clive* v. *C.*, Kay, 600.

(*a*) *Bristow* v. *B.*, 5 B. 289.

Secus, in the case of *contingent* specific legacies not directed to be set apart (*b*).

If the thing specifically bequeathed be reversionary, the legatee will only be entitled to it upon the reversion falling into possession, and interest will run from that time (*c*).

Demonstrative Legacies.

These are payable one year after the testator's death, and carry interest from that time, and not from the testator's death (*d*).

Although the property out of which a demonstrative legacy is directed to be paid may be reversionary, nevertheless, if it is not directed to be paid at a future time, *prima facie*, it is payable at, and will carry interest from, the end of a year from the testator's death (*e*).

General Legacies.

Where the testator has fixed no time for their payment, as we have before seen, they will not be payable until *a year after his decease* (*f*); they will, therefore, as a *general rule*, carry interest only from that time, even though the legacy is to the testator's wife (*g*); a direction in the will to pay the legacy as soon as possible will make no difference (*h*); but interest will be due as from the end of a year, even though the payment of the legacy be then impracticable (*i*), and whether the assets are productive or not (*k*), and though a sale of estates directed for payment of the legacies may, in the discretion of the trustees, have been postponed (*l*).

And it has been held where a legacy was directed to be paid on a future contingency, "with interest," that the interest will be

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(*b*) See *per* Kay, J., *Re Woodin*, [1895] 2 Ch., at p. 316; *Guthrie* v. *Walrond*, 22 Ch. D. 575.

(*c*) *Re Ludlam*, 63 L. T. 330; *Re Gyles*, [1907] 1 Ir. R. 65; cf. *Re White*, 101 L. T. 780.

(*d*) *Mullins* v. *Smith*, 1 Dr. & Sm. 210; *Sleech* v. *Thorington*, 2 Ves. Sen. 560, 563.

(*e*) *Re Walford*, [1912] 1 Ch. 220; [1912] A. C. 658.

(*f*) *Wood* v. *Penoyre*, 13 V. 333, 334; *Re Whiteley*, 25 T. L. R. 543; *Walford* v. *W.*, [1912] A. C. 658.

(*g*) *Stent* v. *Robinson*, 12 V. 461; *Re Whittaker*, 21 Ch. D. 657.

(*h*) *Webster* v. *Hale*, 8 V. 410; *Benson* v. *Maude*, 6 Madd. 15.

(*i*) *Wood* v. *Penoyre*, 13 V. 333, 334; *Gibson* v. *Bott*, 7 V. 89, 96; see *per* Cairns, L.C., *Lord* v. *L.*, L. R. 2 Ch., at p. 789.

(*k*) *Pearson* v. *P.*, 1 Sch. & L. 10.

(*l*) *Minors* v. *Battison*, 1 A. C. 428, referring to *Hutcheon* v. *Mannington*, 1 V. 366; and see Scotch case of *Kirkpatrick* v. *Bedford*, 4 A. C. 96.

computed from the end of the year after the testator's death, but will not be payable until the time mentioned (*m*).

As, however, the rule for the payment of legacies a year after the testator's death was made for the convenience of executors, if they find the state of the testator's assets justifies such a course they may, if they think fit, pay the legacies at an earlier period (*n*).

And a person who some years after the testator's death becomes by substitution entitled to a legacy, may call for immediate payment as the year runs from the testator's death (*o*).

In an administration suit the Court ordinarily pays the particular legacies when a *clear fund* is ascertained, together with interest if due at 4 per cent. up to that time (*p*); but sometimes the Court, if it can be done with safety to creditors, will, by anticipation, direct proportional payments to be made to pecuniary legatees (*p*); and a jointure and annuities have been directed to be paid out of the income of the estate *before decree*, though payment to pecuniary legatees was refused (*q*).

Where an immediate legacy was given, subject to be divested on a future contingency, it has been held that the legatee can call for payment of the legacy a year after the testator's death without giving security. Thus where a legacy was given to A, upon condition that if he succeeded to an estate on the death of B without heirs of his body the legacy was to be void, payment was decreed in the life of A without giving security (*r*).

Exceptions from the General Rule.

(1) **Time fixed by testator.**—He may direct that interest shall be paid from the date of his death (*s*). On the other hand, where a clear intention is shown that legacies are not to be paid until some fixed time, interest will only run from the time fixed for payment of the legacy, even though it is vested (*t*). In *Lord* v. *L.* (*u*) a

(*m*) *Knight* v. *K.*, 2 Si. & S. 490.

(*n*) *Pearson* v. *P.*, 1 Sch. & L. 12; *Angerstein* v. *Martin*, T. & R. 232, 241; *Garthshore* v. *Chalie*, 10 V., at p. 13.

(*o*) *Laundy* v. *Williams*, 2 P. W. 478.

(*p*) *Thomas* v. *Montgomery*, 1 Russ. & M. 729.

(*q*) *Digby* v. *Boycatt*, 4 Ha. 444.

(*r*) *Fawkes* v. *Gray*, 18 V. 131; *Griffiths* v. *Smith*, 1 V. 97; and see *Branstrom* v. *Wilkinson*, 7 V. 421; *Colston* v. *Morris*, 6 Madd. 89.

(*s*) *Re Tinkler's Estate*, 20 Eq. 456; *Londesborough* v. *Somerville*, 19 B. 295.

(*t*) *Lloyd* v. *Williams*, 2 Atk. 108; *Heath* v. *Perry*, 3 Atk. 101; *Tyrell* v. *T.*, 4 V. 1; *Festing* v. *Allen*, 5 Ha. 573; *Gotch* v. *Foster*, 5 Eq. 311; *Lord* v. *L.*, L. R. 2 Ch. 782; *Holmes* v. *Crispe*, 18 L. J. Ch. 439.

(*u*) L. R. 2 Ch. 782.

testatrix having a general power of appointment over property which was the subject of pending litigation, appointed it by will to J. Lord upon trust, " so soon as proceedings in law and equity should be terminated, and the same should come into his possession," to pay certain legacies, and as to the residue upon other trusts. It was held that the trust to pay the legacies did not arise, and, consequently, that the legacies did not carry interest until the litigation ended, and the property came into the hands of J. Lord, which was not until more than eighteen years after the death of the testatrix.

If the time of payment arrives in the testator's lifetime, the legacy becomes an ordinary legacy, and interest will run from the expiration of a year from the testator's death (*x*).

Where a legatee is only entitled to the payment of a vested legacy at a certain time without intermediate interest, in the event of his death his personal representatives, who simply stand in his place, cannot demand payment at an earlier period (*y*).

A mere reference by the testator to the time when his personal estate shall be received, will not be a sufficiently clear indication of his intention, that the legacy is not to be paid before, and, consequently, that the interest is not to run until that date. In *Wood* v. *Penoyre* (*z*) the testator gave a legacy of £900, to be paid out of money due on an Irish mortgage, " when the same shall be recovered." Sir W. Grant, M.R., held that the words " when recovered " did not suspend or postpone the right to interest.

Although the testator directs legacies to be invested for legatees at a period beyond the expiration of one year from his own death, nevertheless, if the direction for investment is for the convenience of the estate, interest will be paid to the legatees upon the legacies, from a year after the testator's death, if the estate is sufficient then to pay them (*a*).

(2) **Where the Court decrees a legacy to be a satisfaction for a debt** (*b*).—In that case interest will be given from the death, not merely from a year after the death, of the testator. And a devise upon trust to sell property, and divide the proceeds among such

(*x*) *Re Palfreeman*, [1914] 1 Ch. 877.

(*y*) *Roden* v. *Smith*, Amb 588; *Chester* v. *Painter*, 2 P. W. 336; *Maher* v. *M.*, 1 L. R. Ir. 22.

(*z*) 13 V. 325.

(*a*) *Varley* v. *Winn*, 2 K. & J. 700; *Olive* v. *Westerman*, 53 L. J. Ch. 525, and (on another point) 34 Ch. D. 70.

(*b*) *Clark* v. *Sewell*, 3 Atk. 99.

persons as " have any just or indisputable demand " upon a third party deceased, will entitle such persons to the interest due to them as far as the money arising from the sale will extend (*c*).

(3) **Legacy Charged upon Land.**—Where a legacy is charged on lands only, and no time is fixed for its payment, interest will be due from the testator's death (*d*).

Where real estate is devised upon trust for sale, and out of the proceeds to pay legacies, interest is only payable from the period of a year after the testator's death (*e*); and if the sale is directed to be made after the death of the tenant for life, interest is only payable from her death (*f*).

(4) **Legacy to Infant Child.**—The general rule is modified in the case of a legacy whether vested or contingent given to an infant (*g*) legitimate (*h*) child by its father or mother (*i*) or to an infant by person *in loco parentis* (*k*), where no other provision is made by the testator for the child's maintenance (*l*). But a contingent legacy given by a mother only carries intermediate income when the mother is actually at the time of the death maintaining the infant or otherwise standing *in loco parentis* (*m*).

In many of the older cases it is said that contingent legacies of this character bear or carry interest for the legatee from the testator's death (*n*). It was, however, decided in *Re Bowlby* (*o*), after an examination of all the authorities, that the infant legatee is only entitled to maintenance out of the income of the legacy. " The fact that the legacy is to bear interest for such a purpose [maintenance], though it may be, and often is, shortly referred to by saying that the legacy bears interest, does not make the legacy the less a contingent one or put the infant into the position of having

(*c*) *Aston* v. *Gregory*, 6 V. 151.

(*d*) *Per* Lord Redesdale, *Pearson* v. *P.*, 1 Sch. & L. 10; and see *Maxwell* v. *Wettenhall*, 2 P. W. 26; *Stonehouse* v. *Evelyn*, 3 P. W. 254; *Spurway* v. *Glynn*, 9 V. 483; *Shirt* v. *Westby*, 16 V. 393.

(*e*) *Turner* v. *Buck*, 18 Eq. 301. (*f*) *Re Waters*, 42 Ch. D. 517.

(*g*) *Raven* v. *Waite*, 1 Swans. 553; *Wall* v. *W.*, 15 Si. 513; *Re Crane*, [1908] 1 Ch. 379.

(*h*) *Beckford* v. *Tobin*, 1 Ves. Sen. 310; *Lowndes* v. *L.*, 15 V. 301; cf. *Hill* v. *H.*, 3 V. & B. 183; *Newman* v. *Bateson*, 3 Swans. 689.

(*i*) *Crickett* v. *Dolby*, 3 V. 10; see Lord Hardwicke's general statement in *Beckford* v. *Tobin*, *supra*.

(*k*) *Wilson* v. *Maddison*, 2 Y. & C. C. C. 372; *Rogers* v. *Soutten*, 2 Keen, 598; *Russell* v. *Dickson*, 2 Dr. & W. 133; *Acherley* v. *Wheeler*, 1 P. W. 783.

(*l*) *Donovan* v. *Needham*, 9 B. 164; cf. *Re Moody*, [1895] 1 Ch. 101.

(*m*) *Re Eyre*, [1917] 1 Ch. 351.

(*n*) *E.g.*, *Beckford* v. *Tobin*, *supra*; and see the judgment of Vaughan Williams, L.J., in *Re Bowlby*, [1904] 2 Ch. 685.

(*o*) [1904] 2 Ch. 685; and see *Re Mellor*, [1922] 1 Ch. 312.

an immediate vested life interest in the income of the legacy. All that the infant is entitled to have is maintenance " (*p*).

In *Re Boulter* (*q*) it was held by Younger, J., that where a legacy is given in trust for an infant for life contingently upon attaining twenty-one, the trustees might, under section 43, subsection 1 of the C. A., 1881 (*r*), apply intermediate income for maintenance, notwithstanding that, unless so applied, it would never be enjoyed by the infant. It should be observed that in this case the testator did not stand *in loco parentis* to the infant. The exception does not extend to other relatives than children, such as grandchildren or nephews or nieces unless the testator has put himself *in loco parentis* (*s*), nor has the exception been extended to a wife (*t*).

Where, however, there is a *direction* to apply a competent part of the interest on a legacy for the maintenance of a natural child (*u*), or of a stranger, even where the legacy is contingent (*x*), or merely a general intention expressed (*y*), interest will be payable from the testator's death.

Although the rule is well established that where a legacy is left by a parent or a person *in loco parentis* to an infant, in that case, whether the legacy be payable at a particular time, or be vested or contingent, maintenance will be allowed from the death of the testator (*z*), or if the child be *en ventre sa mère*, at the testator's death, from its birth (*a*), even though there be a direction to accumulate (*b*), yet this rule is subject to an exception, *viz.*, maintenance will not be allowed out of a legacy to a child, where another fund is provided and is available for that purpose (*c*).

(*p*) *Re Bowlby*, *supra*, *per* Romer, L.J., at p. 706.

(*q*) [1918] 2 Ch. 40.

(*r*) Now replaced by the Trustee Act, 1925, s. 31.

(*s*) *Houghton* v. *Harrison*, 2 Atk. 330; *Desbrambes* v. *Tompkins*, 4 Bro. Ch. 151, n.; 1 Cox, 133; *Festing* v. *Allen*, 5 Ha. 573, 579; *Crickett* v. *Dolby*, 3 V. 10; cf. *Re Boulter*, [1918] 2 Ch. 40.

(*t*) *Stent* v. *Robinson*, 12 V. 461; *Lowndes* v. *L.*, 15 V. 301; *Freeman* v. *Simpson*, 6 Si. 75; *Milltown* v. *Trench*, 4 Cl. & Fin. 276; 11 Bligh. (N.S.) 1; *Re Whittaker*, 21 Ch. D. 657.

(*u*) *Newman* v. *Bateson*, 3 Swans. 689; *Dowling* v. *Tyrell*, 2 Russ. & M. 343.

(*x*) *Harris* v. *Finch*, McClel. 141; *Re Peek's Trust*, 16 Eq. 221; *Re Richards*, 8 Eq. 119; *Chidgey* v. *Whitby*, 41 L. J. Ch. 699.

(*y*) *Pett* v. *Fellows*, 1 Swans. 561 (n.); *Lambert* v. *Parker*, G. Coop. 143; *Leslie* v. *L.*, Ll. & G. 1; *Re Churchill*, [1909] 2 Ch. 431.

(*z*) *Harvey* v. *H.*, 2 P. W. 21; *Chambers* v. *Goldwin*, 11 V. 1; *Brown* v. *Temperley*, 3 Russ. 263.

(*a*) *Rawlins* v. *R.*, 2 Cox, 425.

(*b*) *Mole* v. *M.*, Dick. 310; *M'Dermott* v. *Kealy*, 3 Russ. 265 (n.).

(*c*) *Chambers* v. *Goldwin*, *supra*; *Wynch* v. *W.*, 1 Cox, 433, 434; *Wall* v.

In *Re Moody* (*d*), Kekewich, J., held that this exception did not apply where the testator bequeathed to his son W. £10,000 to be paid on his attaining twenty-one and gave his net residuary estate to his children on attaining twenty-one, or, being daughters, marrying. There was no express provision for maintenance, but the learned Judge read into the will section 43 of the Conveyancing Act, 1881, which gave the trustees a power of maintenance. It was argued that as, by virtue of the statute, there was provision for maintenance out of the income of residue, interest on the £10,000 legacy would not run from the date of the testator's death. The Judge refused to adopt this contention. He said: "The rule of law, as was said by James, L.J., in that case—*Re George* (*e*) —is well established, that a contingency legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent, or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose. There the Lord Justice is really putting, in his own language, all that is said by Lord Hardwicke, Lord Kenyon, and Lord Langdale. . . . No case has been quoted where the other fund has been a share of residue given to the children, and until some case of that kind has been found, I should be extremely unwilling to construe that as coming within the exception mentioned by James, L.J. A residue is an unascertained amount. It might be quite uncertain what the share of each child would be in the residue, and all the cases, as I understand them, go to this, that you must regard the question with reference to the money given to the child." In the more recent case of *Re Abrahams* (*f*) Eve, J., felt bound, against his own opinion, to follow the decision of Kekewich, J., in *Re Moody*.

Where a specific sum is given for maintenance, although it be less than the interest, no more can in general be claimed (*g*), unless, perhaps, it is clearly insufficient, and the legacy is vested (*h*).

W., 15 Si. 513; *Donovan* v. *Needham*, 9 B. 164; *Rudge* v. *Winnall*, 12 B. 357; *Re Rouse's Estate*, 9 Ha. 649; *Re George*, 5 Ch. D. 837; *Re Dickson*, 28 Ch. D. 291; 29 Ch. D. 331; *Re Bowlby*, [1904] 2 Ch., at pp. 698, 704.

(*d*) [1895] 1 Ch. 101.

(*e*) 5 Ch. D. 837.

(*f*) [1911] 1 Ch. 108.

(*g*) *Hearle* v. *Greenbank*, 3 Atk. 717; *Long* v. *L.*, 3 V. 286 (n.).

(*h*) *Aynsworth* v. *Pratchett*, 13 V. 321; *Turner* v. *T.*, 4 Si. 430.

(B) Contingent Legacies.

In the case of wills coming into operation before 1926, the general rule is that a specific or general (other than a residuary) legacy does not give the legatee any right to the income while the legacy is in suspense (*i*). The exception to this rule in the case of a legacy to a child by a parent or person *in loco parentis* has been dealt with above. The rule will, of course, be excluded by the expression of a contrary intention, and a direction to separate a fund from the rest of an estate to answer for a contingent legacy is equivalent to a contingent legacy of the fund *plus* its income (*k*), but out of that income the legatee, if an infant, would be entitled only to maintenance. " Apart from any question as to maintenance the income would be added to the *corpus*, and the legatee could only claim it if and when he became entitled to the *corpus* . . . the setting apart of the fund and the right of the child to maintenance out of the income did not change the contingent nature of the child's legacy. The child did not acquire a vested interest during minority in the income " (*l*). Accordingly, if on the fulfilment of the contingency the legatee does not become entitled to the *corpus* of the legacy, but only to a life interest therein, the legatee will become entitled merely to a life interest in the accretion to the *corpus* of income unapplied for maintenance pending the contingency (*m*). But in the case of wills coming into operation on or after January 1, 1926, the Law of Property Act, 1925, provides (section 175) that a contingent or future specific devise or bequest of property, real or personal, and a contingent residuary devise of freehold land, and a specific or residuary devise of freehold land to trustees upon trust for persons whose interests are contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator, except so far as such income may be otherwise expressly disposed of.

A contingent bequest of residuary personalty carries the intermediate income (*n*). Where there is a contingent legacy of a fund

(*i*) *Re George*, 5 Ch. D. 837; *Guthrie* v. *Walrond*, 22 Ch. D. 575; cf. *Re Eyre*, [1917] 1 Ch. 351.

(*k*) See *Hanson* v. *Graham*, 6 V. 239; and see *per* Vaughan Williams, L.J., in *Re Bowlby*, [1904] 2 Ch., at pp. 704 *et seq.*

(*l*) *Per* Romer, J., *Re Bowlby*, *supra*, at p. 709.

(*m*) *Re Bowlby*, *supra*; *Re Mellor*, [1922] 1 Ch. 312.

(*n*) *Re Holford*, [1894] 3 Ch. 30.

carrying intermediate income to a class to be determined by its members attaining twenty-one, the member of the class who first attains that age does not become entitled to the whole of the income of the fund, but only to the income of the share vested in him, and the income of the shares remaining contingent can be applied for the maintenance of those contingently entitled thereto (*n*). The same rule applies where the class is capable of increase and the vested shares consequently capable of diminution (*o*). The rule did not apply to a contingent devise of real estate to such a class; there the first member of the class attaining a vested interest became entitled to the whole income (*p*).

There is a distinction between a contingent legacy and a legacy vested but subject to be divested.

Where a legacy, either particular (*q*) or residuary (*r*), is given to an infant vested but to be divested on a contingent event, which happens, the legacy will carry interest until that time, from the end of the year after the death of the testator, and the infant, or his or her representatives, will be entitled thereto.

An executory gift of real estate, though residuary, did not carry income until the estate vested (*s*). Lord Westbury stated that this rule was founded on the feudal doctrine that the freehold cannot be in suspense. The rule was, however, applied to equitable interests (*t*).

(C) Maintenance under Statute.

By section 31 of the Trustee Act, 1925, which, in the case of instruments which come into operation after the commencement of that Act, takes the place of section 43 of the Conveyancing Act, 1881, it is provided by sub-section 1 that (subject as thereinafter mentioned) where any property is held by trustees in trust for any person for any interest, vested or contingent, then (subject to any prior interests)—(i) during the infancy of any such person, if

(*n*) *Re Holford*, [1894] 3 Ch. 30.

(*o*) *Re Jeffery*, [1895] 2 Ch. 577 (residuary realty and personalty).

(*p*) *Re Averill*, [1898] 1 Ch. 523; see now Law of Property Act, 1925, ss. 34—36.

(*q*) *Taylor* v. *Johnson*, 2 P. W. 504; *Re Buckley's Trusts*, 22 Ch. D. 583; *Re Humphreys*, [1893] 3 Ch. 1; *Thruston* v. *Anstey*, 27 B. 335; *Montgomerie* v. *Woodley*, 5 V. 522; *Branstrom* v. *Wilkinson*, 7 V. 421; *M'Donald* v. *Bryce*, 2 Keen, 284; *Barber* v. *B.*, 3 My. & C. 688; and see note to *Heath* v. *Perry*, 3 Atk. 102, by Sanders.

(*r*) *Montgomerie* v. *Woodley*, 5 V. 522.

(*s*) *Hodgson* v. *Bective*, 10 H. L. Cas. 656; 12 W. R. 625. See now, however, section 175 of the Law of Property Act, 1925.

(*t*) *Re Eddel's Trusts*, 11 Eq. 559; *Re Averill*, [1898] 1 Ch. 523; *Hopkins* v. *H.*, Cas. t. Talbot, 44, 53, and *per* Sugden, L.C., in *Wills* v. *W.*, 1 Dr. & W. 455; and see *Wade-Gery* v. *Handley*, 1 Ch. D. 653; 3 Ch. D. 374.

his interest so long continues, the trustees may, at their sole discretion, pay to his parent or guardian, or otherwise apply for his maintenance, education, or benefit, the whole or such part (if any) of the income of that property as may in all the circumstances be reasonable, whether or not there is any other fund applicable to the same purpose, or any person bound by law to provide for his maintenance or education; and (ii) if such person on attaining twenty-one has not a vested interest in such income, the trustees are thenceforth to pay the income of the property and of any accretion thereto, under sub-section 2, to him until he attains a vested interest or dies, or until failure of his interest. And by sub-section 2, during the infancy of any such person, if his interest so long continues, the trustees are to accumulate the residue of the income in the way of compound interest, and to hold the accumulations—(1) if such person attains twenty-one or marries, and his interest in such income during infancy or until marriage is a vested interest, or on attaining twenty-one or marrying such person becomes entitled to the property from which such income arose, in fee simple, or absolutely, or for an entailed interest, the trustees are to hold the accumulations in trust for such person absolutely; and (2) in any other case, the trustees (notwithstanding that such person had a vested interest in such income) are to hold such accumulations as an accretion to capital. But the trustees may, at any time during the infancy, apply accumulations as if they were income of the then current year. Sub-section 3 provides that in the case of a contingent interest, the section applies only if the trust carries the intermediate income, but it applies to a future or contingent legacy by the parent of, or a person *in loco parentis* to, the legatee if and for such period as, under the general law, the legacy carries interest for the maintenance of the legatee, and in any such case the rate of interest (if the income available is sufficient, and, subject to any rules of Court to the contrary) is to be five per cent. The section (by sub-section 4) applies to a vested annuity as if the annuity were income of property held by trustees in trust to pay the income to the annuitant for the period for which the annuity is payable, save that in any case accumulations made during the infancy of the annuitant are to be held in trust for the annuitant or his personal representatives absolutely.

It was decided in *Re Bowlby* (*u*), where an infant contingent

(*u*) [1904] 2 Ch. 685; and see *Re Mellor*, [1922] 1 Ch. 312.

legatee was entitled to maintenance out of the intermediate income, but the whole of that income was not applied in maintenance, and the balance was accumulated under section 43, sub-section 2 of the C. A., 1881, that the accumulations formed an accretion to the *corpus* of the legacy, and that the infant legatee acquiring on majority a vested life interest in the *corpus* took merely a life interest in the accretion. Where, however, the infant's legacy is vested, such accumulations of income would go absolutely to the infant (*x*). These decisions are in accordance with the present statutory provisions set out above.

Where a gift of personal estate is severed from the bulk of a testator's property for the benefit of the legatees, it carries income, although the gift is future and contingent, and the income may be applied in maintenance (*y*). But the legatees of a severed fund will only be entitled to interest before vesting, when the severance arises from causes connected with the legacy itself, and not because other causes may render it necessary, as for instance, that the residue itself has become immediately payable (*z*).

(D) Rate of Interest.

By the Rules of the Supreme Court, 1883, by Order 55, r. 64, it is provided that where a judgment or order is made directing an account of legacies, interest shall be computed on such legacies after the rate of 4 per cent. per annum from the end of one year after the testator's death, unless otherwise ordered, or unless any other time of payment or rate of interest is directed by the will, and in that case according to the will (*a*).

But an executor may be charged 5 per cent. on a legacy where the capital has been employed by him in trade (see note to *Robinson* v. *Pett* (*b*)) or there has been gross misconduct on his part, as by selling out stock, holding large balances in his hands (*c*).

Unless compound interest be directed by the will to be paid on

(*x*) *Re Wells*, 43 Ch. D 281; *Re Humphreys*, [1893] 3 Ch. 1. Cf. *Re Woolf*, [1920] 1 Ch. 184.

(*y*) *Re Woodin*, [1895] 2 Ch. 309; *Re Bowlby*, *supra*; and see *Kidman* v. *K.*, 40 L. J. Ch. 359; *Re Medlock*, 55 L. J. Ch. 738; *Re Clements*, [1894] 1 Ch. 665; *Guthrie* v. *Walrond*, 22 Ch. D. 573; *Dundas* v. *Wolfe-Murray*, 1 Hem. & M. 425; *Boddy* v. *Dawes*, 1 Keen, 362; *Johnston* v. *O'Neill*, 3 L. R. Ir. 476; *Re Snaith*, 71 L. T. 318, 42 W. R. 568.

(*z*) *Festing* v. *Allen*, 5 Ha. 578; *Re Inman*, [1893] 3 Ch. 518.

(*a*) See *Re Davy*, [1908] 1 Ch. 61.

(*b*) 3 P. W. 249.

(*c*) *Crackelt* v. *Bethune*, 1 J. & W. 586; *Mosley* v. *Ward*, 11 V. 581; *Jones* v. *Foxall*, 15 B. 388; *Knott* v. *Cottee*, 16 B. 77.

legacies (*d*), interest will be computed on the principal, and not on the principal and interest (*e*), except under particular circumstances, as where an executor neglects to obey an express direction to accumulate (*f*).

(E) Annuities.

Where an *annuity* is given by will, it commences to run from the testator's death and the first payment is made at the end of the year from the death (*g*), unless it be given to be payable, or commence at some other period, as monthly (*h*), or the first quarter day after the testator's death (*i*); in which case an instalment will be payable at the end of the first month or quarter (*k*).

And if the testator directs the payment of an annuity to be made quarterly, a proportional part thereof becomes payable on the first quarter day (*l*).

And if the first payment of such an annuity is directed to be made at the end of eighteen months, a quarter's instalment is then payable (*m*).

The distinction between an annuity and a legacy for life is pointed out by Lord Eldon in *Gibson* v. *Bott* (*n*). "If an annuity is given, the first payment is at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due till the end of two years."

As a general rule, arrears of an annuity will not bear interest (*o*).

Where there is a *legacy of chattels to one for life* with remainder over, the tenant for life will be entitled to the possession thereof upon signing an inventory expressing that those things are in his custody, as given to him for life only, and that afterwards they shall be delivered and remain to the use and benefit of the remainderman (*p*); and no security will be required unless it be shown that the chattels are in danger (*q*).

(*d*) *Arnold* v. *A.*, 2 My. & K. 365.

(*e*) *Perkyns* v. *Baynton*, 1 Bro. Ch. 574; *Crackelt* v. *Bethune*, 1 J. & W. 586.

(*f*) *Raphael* v. *Boehm*, 11 V. 92, 13 V. 590; *Dornford* v. *D.*, 12 V. 127; *Re Barclay*, [1899] 1 Ch. 674.

(*g*) *Gibson* v. *Bott*, 7 V. 96, 97; *Fearns* v. *Young*, 9 V. 553.

(*h*) *Houghton* v. *Franklin*, 1 S. & S. 390.

(*i*) *Storer* v. *Prestage*, 3 Madd. 167. (*k*) *Ibid.*: Theobald (7th ed.), p. 193.

(*l*) *Williams* v. *Wilson*, 5 N. R. 267.

(*m*) *Irvin* v. *Ironmonger*, 2 Russ. & My. 531. (*n*) 7 V. 96.

(*o*) *Anderson* v. *Dwyer*, 1 Sch. & L. 301; *Taylor* v. *T.*, 8 Ha. 120; *Torre* v. *Browne*, 5 H. L. Cas. 555; *Wheatley* v. *Davies*, 24 W. R. 818; *Batten* v. *Earnley*, 2 P. W. 163.

(*p*) *Slanning* v. *Style*, 3 P. W. 336; *Bill* v. *Kynaston*, 2 Atk. 82.

(*q*) *Foley* v. *Burnell*, 1 Bro. Ch. 279; *Leeke* v. *Bennett*, 1 Atk. 471; *Conduitt* v. *Soane*, 4 Jur. (N.S.) 502; see Jarman (6th ed.), pp. 692 *et seq.*

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(F) Duties.

Legacy Duty.

Unless the testator directs to the contrary, *legacy duty* is payable by the legatee, even where the legacy is to a creditor in payment of a debt due from a third person (*r*).

A direction that all legacies are "to be *paid* free of legacy duty" throws on residue the duty on specific, as well as pecuniary, legacies (*s*).

Legacies will be free from duty when the testator has given them free from deduction, free from charge or expense, free from liability (*t*); and where he has given a "clear" sum or annuity (*u*).

Where, however, a fund is given to insure a *clear* annual sum, and to pay the *dividends of the stock*, and not the exact sum to the legatee, it will not be considered as a gift free from the legacy duty, as the term *clear* will be held to refer to the costs of investment, and not to the duty (*x*).

A direction to pay legacy duty upon either a specific or pecuniary legacy amounts to a general pecuniary legacy of the amount of the legacy duty, and in case of a deficiency of assets that legacy must abate accordingly (*y*). Where the duty on some legacies is charged upon the residuary estate, which proves insufficient for this purpose, the legatees must themselves bear the duty to the extent to which the residue proves insufficient to pay the same, and they cannot call upon other legatees whose legacies were not exempted from duty to abate in order to make such payment (*z*).

(*r*) *Foster* v. *Ley*, 2 Scott, 438; 2 Bing. N. C. 269.

(*s*) *Re Johnston*, 26 Ch. D. 538, 554. See also *Ansley* v. *Cotton*, 16 L. J. Ch. 55; Theobald (8th ed.), p. 211.

(*t*) *Barksdale* v. *Gilliat*, 1 Swans. 562; *Courtoy* v. *Vincent*, T. & R. 433; *Gosden* v. *Dotterill*, 1 My. & K. 56; *Louch* v. *Peters*, 1 My. & K. 489; *Stow* v. *Davenport*, 5 B. & Ad. 359; *Warbrick* v. *Varley*, 30 B. 241; Theobald (8th ed.), p. 211.

(*u*) *Gude* v. *Mumford*, 2 Y. & C. Ex. 448; *Haynes* v. *H.*, 3 De G. M. & G. 590; and see *Cole's Will*, 8 Eq. 271; *Re Dyet*, 87 L. T. 744; *Re Saunders*, [1898] 1 Ch. 17; *Re Currie*, 59 L. T. 200.

(*x*) *Banks* v. *Braithwaite*, 32 L. J. Ch 35, questioned in *Re Saunders*, [1898] 1 Ch. 17; *Sanders* v. *Kiddell*, 7 Si. 536; but see *Pridie* v. *Field*, 19 B. 497.

(*y*) *Farrer* v. *St. Catherine's College, Cambridge*, 16 Eq. 19; *Re Turnbull*, [1905] 1 Ch. 726.

(*z*) *Wilson* v. *O'Leary*, 17 Eq. 419; *Thomson* v. *Eastwood*, 2 A. C. 215; *Re Turnbull*, [1905] 1 Ch. 726, 730.

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Estate Duty (*a*).

In the absence of provision to the contrary, settlement estate duty was payable out of the settled property (*b*). It was not a testamentary expense, and therefore a direction that testamentary expenses shall be paid out of residue or a designated fund would not exonerate the settled property (*c*); but a direction that " death duties " or " duties " shall be so paid will exonerate the settled fund (*d*). A direction to pay settlement estate duty was treated in the same way as a direction to pay legacy duty (*e*). In *Re Palmer* (*f*) it was held that the estate duty in respect of a settled legacy must be paid out of that legacy and not out of residue, although the legacy was bequeathed " free of all duties." In this case the duty was payable on the death of a tenant for life, and not on the death of the testator, and the Court considered that there was no indication in the will that the words " free of all duties " should extend to duties becoming payable at periods subsequent to the testator's death.

Income Tax.

A testator may direct the income tax upon an annuity to be paid out of his estate (*g*), but a direction to pay an annuity free from deductions will not be sufficient for that purpose unless there is a manifestation of intention that income tax shall be treated as a deduction (*h*). But where a jointure was directed to be paid " clear of all deductions for taxes or otherwise," it was held that the same must be paid without deduction for income tax (*i*). Where annuities not given free from income tax are paid by the trustees without deducting the tax, the trustees are liable for breach of trust (*k*).

(*a*) Finance Act, 1914, s. 14, abolished settlement duty. Estate duty is now payable on each occasion that there is a " passing " of the settled property on death. (*b*) *Re Maryon Wilson*, [1900] 1 Ch. 565.

(*c*) *Re Lewis*, [1900] 2 Ch. 176; *Re King*, [1904] 1 Ch. 363.

(*d*) *Re Cayley*, [1904] 2 Ch. 781; *Re Turnbull*, [1905] 1 Ch. 726.

(*e*) *Re Turnbull*, *supra*.

(*f*) [1916] 2 Ch. 391; *Re Wedgwood*, [1921] 1 Ch. 601. See also *Re Fenwick*, [1922] 2 Ch. 775; *Re Sarson*, [1925] Ch. 31.

(*g*) *Festing* v. *Taylor*, 3 B. & S. 217, 235; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & Sm. 62; *Re Bannerman's Estate*, 21 Ch. D. 105.

(*h*) *Turner* v. *Mullineux*, 1 J. & H. 334; *Peareth* v. *Marriott*, 22 Ch. D. 182; *Gleadow* v. *Leetham*, 22 Ch. D. 269; *Re Bannerman's Estate*, 21 Ch. D. 105; *Re Buckle*, [1894] 1 Ch. 286; *Re Loveless*, [1918] 1 Ch. 223.

(*i*) *Re Shrewsbury Estate Acts*, [1924] 1 Ch. 315.

(*k*) *Re Sharp*, [1906] 1 Ch. 793; cf. *Re Musgrave*, [1916] 2 Ch. 417.

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18. Recovery of Legacy and Arrears of Interest—Statutes of Limitation—Express Trusts.

Recovery of Legacy.

By section 8 of the Real Property Limitation Act, 1874, no action can be brought to recover a legacy but within twelve years "after a present right to receive the same" has accrued to some person capable of giving a discharge for the same, unless in the meantime some part of the principal money, or some interest thereon, has been paid, or an acknowledgment in writing given by the person by whom the same is payable or his agent to the person entitled thereto or his agent, and in such case no action is to be brought but within twelve years after such payment or acknowledgment was given.

Where, however, the legacy is held upon an *express trust*, the section does not apply (*l*). When an executor holds as executor, time runs (*m*). "An executor was always in a loose sense a trustee for creditors and legatees since he held for their personal benefit and not for his own, but such a trust does not take a case out of the statute. . . . It is necessary [for that purpose] to make out that he is an *express* trustee" (*n*). Time will accordingly run where he holds only on an implied or constructive trust (*o*). It is, however, clear that one who has commenced to hold as an executor may cease to hold as such and may come to hold as trustee upon express trusts (*p*). It is in many cases difficult to say at what moment precisely the change takes place; thus an executor will not by assenting to a residuary legacy by signing a residuary account constitute himself a trustee thereof (*q*). If, however, after completing the administration of the estate and being *functus officio qua* executor, he being also appointed trustee by the will, deals with property appropriated to a legacy he becomes a trustee

(*l*) See Judicature Act, 1873, s. 25, sub.-s. 2, which sub-section is not repealed by the Judicature Act, 1925; *Watson* v. *Saul*, 1 Giff. 188; *Re Swain*, [1891] 3 Ch. 233.

(*m*) *Re Davis*, [1891] 3 Ch. 119.

(*n*) *Per* Lindley, L.J., [1891] 3 Ch., at p. 124; and see *Re Lacy*, [1899] 2 Ch. 149.

(*o*) *Re Davis*, *supra*; cf. *Re Barker*, [1892] 2 Ch. 491; *Re Owen*, [1894] 3 Ch. 220; and see *Re Witham*, [1922] 2 Ch. 413, 421.

(*p*) See *Re Timmis*, [1902] 1 Ch., at pp. 182, 185; *Re Mackay*, [1906] 1 Ch. 25, at p. 31; and see *Solomon* v. *Attenborough*, [1912] 1 Ch. 451; [1913] A. C. 76.

(*q*) *Re Rowe*, 58 L. J. Ch. 203.

thereof (*r*); and the result would seem to be the same even if the executor were not appointed a trustee by the will.

If a legacy secured by express trust is charged upon land, then under section 10 of the Real Property Limitation Act, 1874, the period of limitation applies which would have been applicable had there been no express trust (*s*).

It has been held that an action by a residuary legatee against an executor for the administration of the testator's estate is an action to recover a legacy within section 8 of the Real Property Limitation Act, 1874 (*t*).

Arrears of Interest.

Under section 42 of the Real Property Limitation Act, 1833, a legatee is ordinarily entitled to recover only six years' arrears of interest (*u*). Where, however, the legacy was given by way of express trust it was in several cases before the Real Property Limitation Act, 1874, s. 10, held that time was no bar to the recovery of arrears (*x*).

But if the beneficiary or his representatives allowed a very long time to elapse without attempting to enforce the trust, equity applied, as to interest on the legacy, the principle of the statute (*y*). In the case of legacies secured by express trust, but charged on land within the Real Property Limitation Act, 1874, s. 10, arrears of interest on such legacies are only recoverable within the period allowed by section 42 of the Act of 1833. Where, however, a trust legacy is not charged upon land, neither section 42 of the Act of 1833 nor section 10 of the Act of 1874 apply, and it seems that no rule of limitation (except in cases coming within section 8 of the Trustee Act, 1888) applies to an action for arrears.

Where legatees, in a case where there has been no laches which can alter the rights of the parties, have waited for the payment of their legacies until after the falling in of a reversionary interest which could not, having regard to the interests of all parties, have been properly sold, they will be entitled, on the payment of their

(*r*) *Re Timmis*, *supra*.

(*s*) See Hewitt on Statute of Limitations, p. 183.

(*t*) *Re Richardson*, [1920] 1 Ch. 423.

(*u*) *Hughes* v. *Williams*, 3 Mac. & G. 683; *Chappell* v. *Rees*, 1 De G. M. & G. 393; *Re Walker*, L. R. 7 Ch. 120.

(*x*) See, *e.g.*, *Thomson* v. *Eastwood*, 2 A. C. 215; *Gough* v. *Bult*, 16 Si. 45, 323; *Cox* v. *Dolman*, 2 De G. M. & G. 592; *Burrowes* v. *Gore*, 6 H. L. C. 907.

(*y*) *Thomson* v. *Eastwood*, 2 A. C. 215.

legacies, not merely to six years' arrears of interest, but to interest on their legacies from the expiration of one year after the death of the testator, although it may exceed six years (*z*). And any legatees who have received their legacies without interest are not barred by acquiescence, unless they have done some act to release the estate (*a*).

Section 8 of the Trustee Act, 1888 (which has not been repealed by the Trustee Act, 1925), contains important provisions for the protection of trustees, enabling a trustee—except in cases where the proceeding against him is founded upon fraud or fraudulent breach of trust—to claim the benefit of the Statutes of Limitations (*b*).

(*z*) *Re Blachford*, 27 Ch. D. 676; and see *Re Campbell*, [1893] 3 Ch. 468; and see *Re Walford*, [1912] 1 Ch. 219; [1912] A. C. 658.

(*a*) *Re Blachford*, 27 Ch. D. p. 679.

(*b*) See *Re Swain*, [1891] 3 Ch. 233; *Re Page*, [1893] 1 Ch. 304; *How* v. *Earl Winterton*, [1896] 2 Ch. 626; *Re Timmis*, [1902] 1 Ch. 176; *Re Allsop*, [1914] 1 Ch. 1; *Re Richardson*, [1920] 1 Ch. 423; cf. *Re Claridge's Patent Asphalte Co.*, [1921] 1 Ch. 543.

HOOLEY *v.* HATTON (*a*).

Repetition of Legacies.

A larger legacy given by a codicil held not to be a repetition of a smaller legacy given by a will, it being, in the absence of internal evidence to the contrary, accumulative.

The same specific thing or *corpus* cannot be given twice.

With regard to legacies of quantity, if a legacy of the same amount is given twice for the same cause, and in the same act, and *totidem verbis*, or only with small difference, it will not be double: but where in different writings there is a bequest of equal, greater, or less sums, it is an augmentation.

THE Lady Isabella Finch, by her will (*b*), bearing date August 30, 1768, gave to Lydia Hooley, her woman, the plaintiff, a legacy of £500. The will was executed in the presence of two witnesses.

By a codicil, she gave Lydia Hooley £60, to be paid to her.

She afterwards made a second codicil, dated October 28, 1769, in these words: "I add this codicil to my will: I give Lydia Hooley £1,000." This was in her own handwriting, but not executed before witnesses.

The plaintiff filed her bill for the said legacies and annuity. The question was, whether the last legacy alone passed, or the legatee should have both the £1,000 and the £500.

The Master of the Rolls (Sir Thomas Sewell) had decreed both to the plaintiff, and the defendant appealed to the Chancellor (Lord Apsley), who was assisted by Smythe, L.C.B., and

(*a*) 1 Bro. Ch. 390 (n.); *S. C.* Dick. 461; Lofft, 122, nom. *Hatton* v. *Hooley*.

(*b*) In this report of *Hooley* v. *Hatton*, the codicils of Lady Isabella Finch are not set forth in the order in which they ought to stand. By an extract from the registry of the Prerogative Court of Canterbury, it appears that the legacy given to her maid was in these words :—"I give to my woman Lydia Hooley £500, to be paid to her within three months after my decease."

The first codicil was in these words :—

"October 28, 1769.—This codicil I add to my will. I give £1,000 to Lydia Hooley.—Cecilia Isabella Finch."

The second codicil was as follows :—

"I, Lady Cecilia Isabella Finch do desire this paper writing may be accepted and taken as a codicil to my will. I give to my servant Lydia Hooley, over and besides what I have left her by my will, an annuity of £12 per

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Aston, J. (*c*). This case, after having been argued very much at large (*d*), stood over till Hilary Term, when the Court gave judgment.

Mr. Justice Aston.—There is in this case no internal evidence; therefore, we must refer to the general rule of law.

* * * * *

There are four cases of double legacies:

First, when the same specific thing is given twice, *Cujacius* takes a distinction between the same *res* and the same *quantity*. In the first case, it can take place but once, "*at eadem quantitas sæpius præstari potest*" (*e*).

Secondly, where the like quantity is given twice, Lord Hardwicke, in *The Duke of St. Albans* v. *Beauclerk* (*f*), alluding to the particular circumstances of the case, laid down, one only should be taken, unless an intention appeared to the contrary (*g*). but nothing can be collected from hence, as the title of the Digest must be attended to, which expressly says *animo adimendi* (*h*), where £100 and £100 [are given by different instruments], the legatee [is] entitled to both.

The doctrine from repetition of two equal sums in one will being bad, and in a will and codicil being good, attributing the former to forgetfulness, is strange. The case of the Slaves (*i*), is upon entirely different principles. It would be strange to suppose Lord Hardwicke applied this as a general rule, which would be inconsistent with his recognising (as he did expressly) the authority of Swinburne, 526, 530; but said that the case before him was different, from the internal evidence.

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annum for her life, to be paid quarterly, on the usual days of payment; the first of the said payments to commence on the first of the said days which shall happen after my decease. Lady Isabella Finch further orders the sum of £60 to be paid to Rebecca Hooley.—Cecilia Isabella Finch."—Note by Mr. Miller, 2 Russ. 269.

(*c*) Sir S. S. Smythe, C.B., and Sir Richard Aston, J., had, previous to the Great Seal being delivered to Lord Apsley as Chancellor, been with him Lords Commissioners.

(*d*) Lofft, 122. (*e*) Dig. l. 22, tit. 3, l. 12; Cuj op. t. 4, 381, 382.

(*f*) 2 Atk. 638.

(*g*) Dig. 34, tit. 4, l. 9.

(*h*) Godolphin's Orphan's Legacy, pt. 3, c. 26, s. 46; Swinb. 526, 530, edit. 1728.

(*i*) Dig. 34, tit. 1, l. 18, and that in 2 D'Aguesseau, Pleading the First, p. 21.

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In regard to the cases in the Roman law,—first, where equal sums are given in two distinct writings, both shall pass by the Roman law, and the decisions of this Court are agreeable thereto (*k*).

Thirdly, as to a less sum in the latter deed, as £100 by will, and £50 by the codicil, the legatee shall take both (*l*).

Fourthly, as to a larger sum after a less, Ricard (*m*) says, where they are in the *same* instrument, the two sums are not blended, but the legatee has two legacies; and the heir must show that the one was meant to be blended with the other, the presumption being in favour of what is written (*n*).

The law seems to be, and the authorities only go to prove the legacy not to be double where it is given for the *same cause* in the *same act*, and *totidem verbis*, or only with small difference; but where in *different* writings there is a bequest of equal, greater, or less sums, it is an augmentation, and therefore Lydia Hooley is entitled to both the sums of £500 and £1,000.

Lord Chief Baron Smythe.—I am of the same opinion.

* * * * *

Lord Chancellor Apsley (*o*).—It would be sufficient for me to say I am of the same opinion, if Aston, J., had not referred to me with respect to some of the cases.

By the civil law, where two pecuniary legacies were given by the *same* will, the legatee must prove it was to be doubled: but where the two bequests are in *different* writings, there the presumption shall be in favour of the legatee.

No argument can be drawn, in the present case, from internal evidence: we must therefore refer to the rule of the civil law.

(*k*) Dig. 22, tit. 3, l. 12; and Gothofred's note *in Diversis Scripturis*, Dig. 30, tit. 1, l. 34; *in Eadem Scriptura*, Cujacius, 4, 381, distinguishes between a *corpus* and quantity; Voet on the 31 & 32 Digest; Godolphin, pt. 3, c. 26, s. 46, Swinburne, 526; Ricard, Traité des Donations, Vol. 1, pp. 419, 420, 421; *Wallop* v. *Hewett*, 2 Ch. R. 70; *Newport* v. *Kynaston*, Rep. t. Finch, 294; Menochius *de Præsumptionibus*, l. 4; 2 Ch. R. 58.

(*l*) Godolphin, pt. 3, c. 25, s. 19; *Ridout* v. *Payne*, 1 Ves. Sen. 10; *Pitt* v *Pidgeon*, 1 Ch. Cas. 301.

(*m*) Vol. 1, p. 451 (Traité des Donations), folio-edition.

(*n*) *Windham* v. *W.*, Rep. t. Finch, 267; *Pitt* v. *Pidgeon*, 1 Ch. Cas. 301; *Masters* v. *M.*, 1 P. W. 421, 423; and see *Curry* v. *Pile*, 2 Bro. Ch. 225.

(*o*) Afterwards Earl Bathurst.

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After commenting on Lord Hardwicke's decision in *The Duke of St. Albans* v. *Beauclerk* (*p*), and referring to *Wallop* v. *Hewett* (*q*), *Windham* v. *W.* (*r*), *Mayor of London* v. *Russell* (*s*), *Newport* v. *Kynaston* (*t*), *Pitt* v. *Pidgeon* (*u*), 3 Huber, Prælectiones Leg. Civ. 122, and *Stirling's Case*, in Scotland (*x*), the Lord Chancellor concluded with saying, I have therefore the satisfaction to think we confirm Lord Hardwicke's opinion.

The decree of the Master of the Rolls affirmed.

NOTES.

1. Generally.
2. Legacies of quantity given in different instruments, p. 735.
3. Legacies of quantity given by the same instrument, p. 738.
4. Extrinsic evidence of testator's intention, p. 739.
5. Incidents of original attach to substitutional legacies, p. 739.

1. Generally.

The rules laid down in the principal case are (1) when the same specific thing is given twice whether in the same or different instruments it is one gift (*y*); (2) where legacies are given by different writings, the presumption is that they are cumulative whether the amount be equal, greater, or less (*z*); (3) where legacies of the same amount are given by the same document, the presumption is that they are not cumulative.

Double gift of the same specific thing.—With regard to the first case mentioned by Mr. Justice Aston in *Hooley* v. *Hatton*, it is clear that where the same specific thing or *corpus* is given, either in the *same* instrument or in *different* instruments, in the nature of the thing it can but be a repetition; where, for instance, there are two gifts of a ruby ring, and there is no pretence that there are two ruby rings (*a*).

(*p*) 2 Atk. 636.
(*q*) 2 Ch. R. 70.
(*r*) Rep. t. Finch, 267.
(*s*) Rep. t. Finch, 290.
(*t*) Rep. t. Finch, 294.
(*u*) 1 Ch. Cas. 301.
(*x*) 2 Fountainhall, 231.
(*y*) *The Duke of St. Albans* v. *Beauclerk*, 2 Atk. 638; *Ridges* v. *Morrison*, 1 Bro. Ch. 392; *Suisse* v. *Lowther*, 2 Ha. 424; *Roxburgh* v. *Fuller*, 13 W. R. 39.
(*z*) See cases, note 2.
(*a*) See cases to Note (*y*), *supra*.

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The cases to which the second rule relates are those which chiefly give rise to difficulty.

2. Legacies of Quantity given in Different Instruments.

Legacies of quantity given by different testamentary instruments are *prima facie* cumulative whether the second be of the same amount (*b*), or less (*c*), or as in the principal case larger (*d*) than the other.

A fortiori will the legatee be entitled to both legacies where there is any variation as to the mode or times of payment of each legacy, as, where the legacy given by a will, and that given by a codicil, are payable at different times, carry interest from different dates, are given over to different persons (*e*), or upon or for different trusts and purposes (*f*), or where the gifts are not *ejusdem generis*—*e.g.*, a legacy and an annuity (*g*), share of a residue and a pecuniary legacy (*h*), a pecuniary and a specific legacy, although the codicil recited the bequest in the will (*i*). The fact that the legacies are given to different trustees may, however, assist in rebutting the presumption that the legacies are cumulative (*k*).

Of course, the rule is merely a rule of construction, and must yield to clear expression of contrary intention in the instruments or other *intrinsic* evidence of intention that one legacy is to be in substitution for the other; but the express statement that some legacies are to be "in addition," and the omission of those words as to others, is not sufficient to show that the latter are not to be cumulative (*l*).

(*b*) *Wallop* v. *Hewett*, 2 Ch. R. 70; *Newport* v. *Kynaston*, Rep. t. Finch, 294; *Baillie* v. *Butterfield*, 1 Cox, 392; *Forbes* v. *Lawrence*, 1 Coll. 495; *Radburn* v. *Jervis*, 3 B. 450; *Lee* v. *Pain*, 4 Ha. 201, 216; *Roch* v. *Callen*, 6 Ha. 531; *Russell* v. *Dickson*, 4 H. L. Cas. 293.

(*c*) *Pitt* v. *Pidgeon*, 1 Ch. Cas. 301; *Hurst* v. *Beach*, 5 Madd. 358; *Townshend* v. *Mostyn*, 26 B. 72; *Wilson* v. *O'Leary*, 12 Eq. 525, L. R. 7 Ch. 448; *Walsh* v. *W.*, 4 Ir. R. Eq. 396.

(*d*) *Suisse* v. *Lowther*, 2 Ha. 424; *Hertford* v. *Lowther*, 7 B. 107; *Lyon* v. *Colville*, 1 Coll. 449; *Brennan* v. *Moran*, 6 Ir. Ch. R. 126; *Cresswell* v. *C.*, 6 Eq. 69, 76; *Wilson* v. *O'Leary*, *supra*.

(*e*) *Hodges* v. *Peacock*, 3 V. 735, 737; *Mackenzie* v. *M.*, 2 Russ. 262; *Bartleit* v. *Gillard*, 3 Russ. 149; *Guy* v. *Sharp*, 1 My. & K. 589; *Wray* v. *Field*, 6 Madd. 300; *S. C.*, 2 Russ. 257; *Watson* v. *Reed*, 5 Si. 431; *Strong* v. *Ingram*, 6 Si. 197; *Robley* v. *R.*, 2 B. 95; *Att.-Gen.* v. *George*, 8 Si. 138; *Lee* v. *Pain*, 4 Ha. 201, 223.

(*f*) *Sawrey* v. *Rumney*, 5 De G. & Sm. 698; *Spire* v. *Smith*, 1 B. 419.

(*g*) *Masters* v. *M.*, 1 P. W. 421, 423.

(*h*) *Gordon* v. *Anderson*, 4 Jur. (N.S.) 1097; *Ledger* v. *Hooker*, 18 Jur. 481.

(*i*) *Guy* v. *Sharp*, 1 My. & K. 589. (*k*) *Benyon* v. *B.*, 17 V. 34, 42.

(*l*) *Moggridge* v. *Thackwell*, 1 V. 464; *Barclay* v. *Wainwright*, 3 V. 466;

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As to what intrinsic evidence will be sufficient to exclude the rule, in an early case it was said that "simple repetition, where it is exact and punctual," is evidence that the second is substitutional (*m*); and in another case, that "where the same quantity has been given, and the same cause, or no additional reason" is given in the second instrument, the second is substitutional (*n*). The modern rule, however, appears to be somewhat narrower—namely, that when in both instruments a motive, and the same motive, is expressed for the gift, and the amount is identical, this will raise the *presumption* that the second gift is substitutional; but no presumption will be raised if in either instrument there be no motive, or a different or additional motive expressed, although the sums be the same (*o*).

The fact that the repetition of a bequest in a codicil adapts the bounty of the testator to altered circumstances has been held sufficient to raise the presumption that it is substitutional (*p*).

Where a second instrument expressly refers to the first, although the legacies given in each to the same person may be of different amounts, it may appear that the latter gift was intended to be substitutional (*q*).

So, where a codicil furnishes intrinsic evidence that the testator is thereby revising, explaining, and qualifying his will, legacies may be construed to be substitutional (*r*). And where a testator in his codicil refers to a bequest therein as a *sufficient* provision, he may thereby sufficiently manifest his intention, that the legatee was to have nothing else (*s*).

Mackenzie v. *M.*, 2 Russ. 273; *Wray* v. *Field*, 2 Russ. 257; *Townshend* v. *Mostyn*, 26 B. 72; *Allen* v. *Callow*, 3 V. 289. See also *per* Lord Sugden, C., in *Russell* v. *Dickson*, 2 Dr. & War. 133, 4 H. L. Cas. 293; *Lee* v. *Pain*, 4 Ha. 201; *Watson* v. *Reed*, 5 Si. 431; *Sawrey* v. *Rumney*, 5 De G. & Sm. 698; *Spire* v. *Smith*, 1 B. 419.

(*m*) *Per* Lord Thurlow in *Moggridge* v. *Thackwell*, 1 V. 472.

(*n*) *Per* Lord Thurlow in *Ridges* v. *Morrison*, 1 Bro. Ch. 388, at p. 391; and see comments of Sir W. Grant, in *Benyon* v. *B.*, 17 V. 42.

(*o*) *Hurst* v. *Beach*, 5 Madd. 358; *Benyon* v. *B.*, *supra;* and cf. *Roch* v. *Callen*, 6 Ha. 531; *Suisse* v. *Lowther*, 2 Ha. 424; *M'Kinnon* v. *Peach*, 2 Keen, 555; *Wilson* v. *O'Leary*, 12 Eq. 525, L R. 7 Ch. 448; *Lobley* v. *Stocks*, 19 B. 392; *Lord* v. *Sutcliffe*, 2 Si. 273.

(*p*) *Allen* v. *Callow*, 3 V. 289; *Osborne* v. *Duke of Leeds*, 5 V. 369; see too *Lee* v. *Pain*, 4 Ha. 201, 243; and *Barclay* v. *Wainwright*, 3 V. 462.

(*q*) *Currie* v. *Pye*, 17 V. 462; *Mayor of London* v. *Russell*, Rep. t. Finch, 290; *Martin* v. *Drinkwater*, 2 B. 215; *Bristow* v. *B.*, 5 B. 289; *Russell* v. *Dickson*, 4 H. L. Cas. 305.

(*r*) *Moggridge* v. *Thackwell*, 1 V. 464, 3 Bro. Ch. 517; *Benyon* v. *B.*, 17 V. 34, 43; *Hinchcliffe* v. *H.*, 2 Dr. & Sm. 96; *Fraser* v. *Byng*, 1 Russ. & M. 90; Theobald (8th ed.), p. 170. (*s*) *Robley* v. *R.*, 2 B. 95; Theob. (8th ed.), p. 171.

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In other cases, though there may be two documents in form, they may really be one, the second being substitutional for or explanatory of the earlier. Thus, where a later instrument as to the legacies appears to be a mere copy of the former, whether the dates be the same or different, it will so far be held substitutional for the former instrument and the legacies not cumulative (*t*).

In *Roxburgh* v. *Fuller* (*u*), Lord Romilly, M.R., said : "The question is similar to that decided in *Tuckey* v. *Henderson*, not whether one legacy is substitutional for the other, but whether the latter codicils were substituted for the earlier ones."

The second document, though not a copy, may on the face of it appear to be a substitutionary disposition (*x*).

In *Tuckey* v. *Henderson* (*y*), a second will was held to be substitutional for a former will, though both were admitted to probate, and therefore legacies in the former will did not take effect; but it was held that an appointment by the first will under a power stood as well as a legacy to the appointee by the second will, as the appointment related to a separate fund, and the second will could not operate as an appointment of it.

It is observed in a note to *Fraser* v. *Byng* (*z*), that if different instruments are *exactly* co-extensive in their provisions, and in other respects are so nearly identical as to satisfy the Judge that they could never be intended to exist together, probate will be granted only of the latest in date, and the others will be held to be virtually revoked. So, in another case (*a*), the Court held the intention was to revoke the first codicil by a second and granted probate of the will and the second codicil only. And parol evidence will be resorted to, if necessary, to assist in determining the intention (*b*).

But where testamentary papers, very similar in form, and

(*t*) *Coote* v. *Boyd*, 2 Bro. Ch. 521, Belt's edit.; *Barclay* v. *Wainwright*, 3 V. 462; *Att.-Gen.* v. *Harley*, 4 Madd. 263; *Hemming* v. *Gurrey*, 2 S. & S. 311, 1 Bligh (N.S.) 479; *Gillespie* v. *Alexander*, 2 S. & S. 145; *Campbell* v. *Lord Radnor*, 1 Bro. Ch. 271; *Tuckey* v. *Henderson*, 33 B. 174; *Hinchcliffe* v. *H.*, 2 Dr. & Sm. 96; *Whyte* v. *W.*, 17 Eq. 50; *Hubbard* v. *Alexander*, 3 Ch. D. 738.

(*u*) 13 W. R. 39.

(*x*) *Kidd* v. *North*, 14 Si. 463, 2 Ph. 91; *Jackson* v. *J.*, 2 Cox, 35.

(*y*) 33 B. 174.

(*z*) 1 Russ. & M. 102; and see Tristram & Coote (16th ed.), p. 509.

(*a*) *Chichester* v. *Quatrefages*, [1895] P. 186; see also *Re Bryan*, [1907] P. 125.

(*b*) *Fraser* v. *Byng*, *supra*. And see *Dempsey* v. *Lawson*, 2 P. D. 98; *Jenner* v. *Finch*, 5 P. D. 107; *O'Leary* v. *Douglass*, 3 L. R. Ir. 323; *Hubbard* v *Alexander*, 3 Ch. D. 738.

embracing the same general range of objects, still present such discrepancies that one cannot amount to more than a partial revocation or repetition of the rest, the Probate Court allows all of them to be proved, and leaves it to Courts of equity to exercise their own judgment on the question of addition or substitution, whenever those Courts are called upon to construe their effect for the purpose of determining the rights of legatees (*c*).

If probate has been granted as to two writings, *as of a will and codicil*, it is conclusive of the fact that they are distinct instruments, although they are both written on the same paper (*d*).

But if two instruments have been admitted to probate *as one testament*, it has been held that they must for all purposes be considered as one instrument only, and a Court of construction is bound to consider them as such (*e*).

3. Legacies of Quantity given by the same Instrument.

Where legacies of quantity in the *same* instrument are given to the same person *simpliciter*, and are of *equal* amount, one only will be good, the repetition, according to the doctrine of the civil law, being considered (though strangely, in Aston, J.'s, opinion) to arise from forgetfulness; nor will small differences in the way in which the gifts are conferred afford internal evidence that the testator intended that they should be cumulative (*f*).

The rule is the same with regard to annuities of equal amount given by the same instrument (*g*).

Where, however legacies given by the *same* instrument are of *unequal* amount, they are *prima facie* cumulative, and this applies in whatever order they stand, and not merely, as might be inferred from Aston, J.'s, remarks, where a larger sum is given after a less (*h*).

(*c*) *Re O'Connor*, 13 L. R. Ir. 406, and see Williams' Exors. (11th ed.), pp. 120, 121.

(*d*) *Baillie* v. *Butterfield*, 1 Cox, 392; Williams' Exors. p. 1036; but see *Campbell* v. *Lord Radnor*, 1 Bro. Ch. 272; *Walsh* v. *Gladstone*, 1 Ph. 294; *Martin* v. *Drinkwater*, 2 B. 215; and cf. *Hubbard* v. *Alexander*, *supra*.

(*e*) *Heming* v. *Clutterbuck*, 1 Bligh (N.S.) 491, 492; *Brine* v. *Ferrier*, 7 Si. 549; *The Duke of St. Albans* v. *Beauclerk*, 2 Atk. 636; Williams' Exors. (11th ed.), p. 1036.

(*f*) *Greenwood* v. *G.*, 1 Bro. Ch. 31 (n.); *Garth* v. *Meyrick*, 1 Bro. Ch. 30.

(*g*) See *Holford* v. *Wood*, 4 V. 76; *Manning* v. *Thesiger*, 3 My. & K. 29; *Brine* v. *Ferrier*, 7 Si. 549; *Early* v. *Benbow*, 2 Coll. 342; *Early* v. *Middleton*, 14 B. 453.

(*h*) *Windham* v. *W.*, Rep. t. Finch, 267; *Curry* v. *Pile*, 2 Bro. Ch. 225; *Hartley* v. *Ostler*, 22 B. 449; and see *Baylee* v. *Quin*, 2 Dr. & War. 116; *Adnam* v. *Cole*, 6 B. 353; *Yockney* v. *Hansard*, 3 Ha. 622; *Brennan* v. *Moran*, 6 Ir. Ch. R. 126; Williams' Exors. (11th ed.), p. 1035.

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This rule, as the others, must yield to intention if it appears that the second is not a distinct gift, as in *Yockney* v. *Hansard* (*i*), where the Court held that the second gift, though apparently distinct, was merely a statement of what the daughters would have in certain events under the first gift.

And the cases as to double gifts by the same instrument have no application to the case of a residue given to a person to whom previously a specific or pecuniary gift has been made (*k*).

Where a legacy is given by a codicil in substitution for a legacy given by a previous instrument, upon a revocation of the last legacy, the former will not be set up again (*l*).

4. Extrinsic Evidence of Testator's Intention.

In cases where a presumption is raised that the second legacy in a different instrument is in substitution of a legacy in a former (*m*), extrinsic evidence of intention is admissible to rebut the presumption, and in support of, but not in opposition to, the expressions in the document (*n*); where on the construction of the instruments the legacies are cumulative, extrinsic evidence to rebut the construction is inadmissible (*o*). It seems that the rule that where two legacies of the same amount are given to the same person by the same instrument the second is substitutional is not a presumption of law but a rule of construction, and cannot be affected by admitting extrinsic evidence (*p*).

Extrinsic evidence is, however, admissible to show the circumstances of the testator at the time of making his will, so as to enable the Court to place itself in the position of the testator (*q*).

5. Incidents of Original attach to Substitutional Legacies.

As a rule, a legacy substituted for, or in addition to a previous legacy to the same person, is subject to the conditions (if any) and incidents attaching to the original legacy (*r*).

(*i*) 3 Ha. 620. (*k*) *Kirkpatrick* v. *Bedford*, 4 A. C. 96, 103.
(*l*) *Boulcott* v. *B.*, 2 Drew. 25. (*m*) See above, p. 736.
(*n*) *Hurst* v. *Beach*, 5 Madd., p. 361; *Hall* v. *Hill*, 1 Dr. & War. 94, 116; *Suisse* v. *Lowther*, 2 Ha. 424; *Lee* v. *Pain*, 4 Ha. 216; *Guy* v. *Sharp*, 1 My. & K. 589.
(*o*) *Hurst* v. *Beach*, 5 Madd. 351; *Roch* v. *Callen*, 6 Ha. 531, 533; *Wilson* v. *O'Leary*, L. R. 7 Ch. 448, 456; Williams' Exors. (11th ed.), pp. 1038, 1039; Taylor (11th ed.), pp. 843, 847.
(*p*) See the judgment in *Hurst* v. *Beach*, *supra;* and see Hawkins (3rd ed.), 355; Taylor (11th ed.), pp. 846, 847.
(*q*) *Martin* v. *Drinkwater*, 2 B. 215; *Guy* v. *Sharp*, 1 My. & K. 589.
(*r*) See for statements of general rule, *Re Bodin*, [1907] 1 Ch., at p. 149,

But this rule does not, except in special cases (*s*), apply where the substituted legacy is to a different person (*t*), nor when the conditions are by one document confined to legacies "hereafter" given (*u*), nor when the legatee is given the second legacy absolutely, but takes only a limited interest under the former legacy (*x*). The rule has apparently no application where the added or substituted legacy is of a different nature to the preceding legacy; as where a legacy of household furniture and effects is followed in the same will by a legacy of an annuity (*y*).

Where the rule applies "the cases have not gone further than this; where the subject of the first gift is given absolutely to the party or is made defeasible, the second gift has been held to be given upon similar terms; for example, if the former gift were absolute and free of legacy duty, the additional gift has been held to have all the same incidents; so, if the former gift is to be lost on a certain event, the additional gift is to be defeated on the same condition. In no case has it been held that the latter gift is to go to the parties entitled under the subsequent limitations of the former gift" (*z*).

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per Fletcher Moulton, L.J., and *Re Joseph*, [1908] 2 Ch., at p. 512, *per* Farwell, L.J.; *Leacroft* v. *Maynard*, 1 V. 279, 3 Bro. Ch. 233 (fund); *Crowder* v. *Clowes*, 2 V. 449 (fund); *Shaftesbury* v. *Marlborough*, 7 Si. 237 (legacy duty); *Bristow* v. *B.*, 5 B. 289 (fund); *Cookson* v. *Hancock*, 2 My. & C. 606 (limitations of legacy); *Day* v. *Croft*, 4 B. 561 (separate use); *Warwick* v. *Hawkins*, 5 De G. & Sm. 481 (separate use); *Johnstone* v. *Earl Harrowby*, 1 De G. F. & J. 183, reversing 1 John 425 (legacy duty and abatement); *Re Lawrenson*, [1891] W. N. 28 (restraint on anticipation); *Fisher* v. *Brierley*, 30 B. 267 (legacy duty); but see *Alexander* v. *A.*, 5 B. 518; *King* v. *Tootel*, 25 B. 23; *Re Howe*, [1910] W. N. 190; Williams' Exors (11th ed.), 1040.

(*s*) *Re Beckhouse*, [1916] 1 Ch. 65.

(*t*) *Chatteris* v. *Young*, 2 Russ. 183; *Re Joseph*, [1908] 2 Ch. 507; cf. *Leacroft* v. *Maynard*, 1 Ves. Jun. 279; 3 Bro. C. C. 233; *Re Backhouse*, [1916] 1 Ch. 65, 71.

(*u*) *Bonner* v. *B.*, 13 V. 379; *Strong* v. *Ingram*, 6 Si. 197; cf. *Re Sealy*, 85 L. T. 451.

(*x*) *Re Mores' Trust*, 10 Ha. 171; *Mann* v. *Fuller*, Kay, 624, 626; and see *Alexander* v. *A.*, 5 B. 518; *Haley* v. *Bannister*, 23 B. 336; *Hill* v. *Jones*, 37 L. J. Ch. 465; *Cookson* v. *Hancock*, 2 My. & C. 606; *Hargreaves* v. *Pennington*, 12 W. R. 1047.

(*y*) *Re Howe*, [1910] W. N. 190.

(*z*) *Per* Wood, V.-C., *Mann* v. *Fuller*, Kay 626; *Re Boddington*, 25 Ch. D 685. See also *Overend* v. *Gurney*, 7 Si. 128; *Re Joseph*, [1908] 2 Ch. 507.

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